Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term 2000

WARREN Y.S.C. ALBANO and
CAROLINE C.S. ALBANO,

Petitioners,

vs.

NORWEST FINANCIAL HAWAII, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the issue *whether a prior state court foreclosure decree extinguishes a borrower's Title 15, Section 1635, extended three-year Truth-In-Lending Act right to rescind a mortgage transaction* governed by the Commerce and the Supremacy Clauses of the United States Constitution, and thus by the provisions of the federal Truth-In-Lending Act, or by the Full Faith and Credit Act, and thus state *res judicata* doctrines?

2. If the issue *whether a prior state court foreclosure decree extinguishes a borrower's Title 15, Section 1635, extended three-year Truth-In-Lending Act right to rescind a mortgage transaction* is governed by the Full Faith and Credit Act, and thus state *res judicata* doctrines, is there any clear controlling *res judicata* precedent in Hawaii judicial decisions extinguishing that federal rescission right?

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I. JURISDICTIONAL STATEMENT

Two separate yet identical Petitions for Writs of *Certiorari* are being simultaneously filed in this Court from Hawaii by Petitioners Mr. and Ms. Albano ("Albanos") and by Petitioner Ms. Menor ("Menor"), seeking joint review of identical Ninth Circuit Court of Appeals' decisions which affirmed separate district court dismissals of their Truth-In-Lending Act complaints in separate cases below on the same *res judicata* grounds.

The Petitions should, therefore, be considered together, and thus have been jointly prepared, although separately filed procedurally.

In Albano, which was chosen by the Court of Appeals to be the lead case, its published Opinion was filed on March 30, 2001.

In Menor, a Memorandum Opinion was filed on April 3, 2001, based upon its Opinion entered in Albano.

Both Albanos and Menor sought reconsideration *en banc*, which was denied by their identical Ninth Circuit Court of Appeals' merits panel on the same day, May 17, 2001

The jurisdiction of the district court in both cases was based upon Section 1635 of Title 15 of the United States Code.

This Court has jurisdiction to review both requests for a Writ of *Certiorari*, each timely filed within ninety days of the denial of reconsideration, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The Court of Appeals' decisions being challenged, and the relevant text of the principal governing provisions of law, are set forth in the *Appendix* to this Petition, and are as follows:

Published Opinion Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed March 30, 2001 (Albanos);

Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed May 17, 2001 (Albanos);

Memorandum Decision Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed April 3, 2001 (Menor);

Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed May 17, 2001 (Menor);

Article I, Section 8, Clause 3, Of The United States Constitution (Commerce Clause);

Article IV, Section 1, Of The United States Constitution (Full Faith And Credit Clause);

Article VI, Clause 2, Of The United States Constitution (Supremacy Clause);

Section 1635 Of Title 15 Of The United States Code (Truth-In-Lending Act);

Section 1738 Of Title 28 Of The United States Constitution (Full Faith And Credit Act);

Rule 13 Of The Hawaii Rules Of Appellate Procedure (Certification By Federal Courts Of State Law Questions To Hawaii Supreme Court For Decision).

III. STATEMENT OF THE CASE

Both Albanos and Menor were served with state court foreclosure complaints in Hawaii claiming that they had defaulted in the payment of their respective residential mortgages.

Neither answered, and defaults were requested and entered against them by court clerks.

Summary judgment motions were then filed against each, neither appeared for the hearing of those motions, foreclosure decrees were entered against then, and neither appealed.

Instead, after summary judgment, but before any public auctioning of their property and before state court confirmation of sale, and within three years of the consummation of their respective mortgage loans, both sent their lenders written cancellation notices alleging Truth-In-Lending Act ("TILA") violations and demanding rescission, and both separately filed TILA complaints in the Hawaii district court.

Their lenders, nevertheless, had the auction sales to themselves, respectively, confirmed, and title to their respective property was transferred to their lender.

Their separate TILA cases were subsequently dismissed by the district court on res judicata grounds; both appealed; and the Ninth Circuit Court of Appeals affirmed the dismissals in both cases, entering a published Opinion in Albano, and a Memorandum decision in Menor.

The following, briefly, are the relevant, detailed facts in Albano:

The Albanos entered into two successive 1994 mortgage transactions on March 15, 1994, and on July 11, 1994, each of which qualified as a TILA Section 1635 security interest governed by federal law.

On May 27, 1996, Norwest filed a foreclosure suit in state court against the Albanos, alleging a loan default. Summary judgment was granted on January 13, 1997. Unrepresented by counsel, the Albanos did not answer the complaint nor attend the summary judgment hearing.

Thereafter, on March 4, 1997, and March 12, 1997, within three years of loan consummation, pursuant to the extended rescission period set forth in Section 1635(f), and before the subject property had been auctioned or any foreclosure sale confirmed, Caroline Albano sent two successive notices of cancellation to Norwest, demanding a TILA rescission, which was immediately refused.

Caroline Albano thereafter filed a TILA complaint in district court on March 14, 1997. Norwest filed a motion for summary judgment on November 2, 1998, which was heard on January 25, 1999.

The district court, specifically relying upon two of its earlier decisions in similar TILA cases, and rejecting a recent, contrary state court ruling, granted the motion and entered Final Judgment against the Albanos, concluding that the action was barred by Hawaii law pursuant to the doctrine of *res judicata* since there had been an unappealed, intervening state foreclosure judgment entered between the same parties, which the district court concluded it was bound by, pursuant to the federal Full Faith and Credit Act.

The underlying facts in Menor are substantially identical to those, *supra*, in Albano:

Menor entered into a mortgage transaction on August 3, 1995, which qualified as a TILA Section 1635 security interest governed by federal law.

On July 16, 1996, Finance Factors filed a foreclosure suit in state court against Menor and her co-borrowers, alleging a loan default, and summary judgment against them was granted on October 23, 1996, who, unrepresented by counsel, did not answer the complaint nor attend the summary judgment hearing in state court.

Thereafter, on July 31, 1998, within three years of the consummation of her loan, pursuant to the extended rescission period set forth in Section 1635(f), and before the subject property had been auctioned or any foreclosure sale confirmed, Menor sent a notice of cancellation to Finance Factors, demanding a TILA rescission, which was immediately refused.

Menor thereafter filed a TILA complaint in district court, *pro se*, on August 3, 1998. Finance Factors filed a motion to dismiss or for summary judgment on August 28, 1998, which was heard on December 7, 1998.

The district court, relying specifically upon two of its earlier decisions in similar TILA cases, and rejecting a recent, contrary state court ruling, granted the motion and entered Final Judgment against Menor, concluding that the action was barred by Hawaii law pursuant to the doctrine of *res judicata* since there had been an unappealed, intervening state foreclosure judgment entered between the same parties, which the district court concluded it was bound by, pursuant to the federal Full Faith and Credit Act.

The written district court decisions in both cases were virtual carbon copies, as it were, of one another.

There was one important factual difference in the two cases, however, which the Court of Appeals overlooked.

In Albano, the state circuit court sitting on Maui, in its written foreclosure decree ordered that the Albanos, although allowed to stay in their home until confirmation of sale, "are perpetually barred of and from any and all right, title, and interest in the mortgaged property and any part of the mortgaged property, except as otherwise ordered by this Court" (Order and Decree, Paragraph 12).

In Menor, however, the state circuit court sitting in Honolulu, in its written foreclosure decree ordered that Menor, although also allowed to stay in her home until confirmation of sale, "will be perpetually barred of and from any and all right, title and interest in the Property or any part thereof *upon closing of the sale herein authorized*" (Order and Decree, Paragraph 6, Emphasis Added).

In practice, however, all circuit courts in Hawaii have always allowed residential borrowers, notwithstanding the wording of the foreclosure decree, to halt a foreclosure by bringing their mortgages current prior to any confirmation of sale, probably because there is no equity of redemption in Hawaii law, and even in Albano the Court retained jurisdiction in its foreclosure decree, *supra*, "as otherwise ordered."

The same merits panel of the Ninth Circuit Court of Appeals heard both appeals, and affirmed, however, holding that a final judgment of foreclosure in Hawaii automatically precludes any right to rescind the underlying mortgage transaction. The Court of Appeals specifically limited its decision in the two cases however to Hawaii. The respective decisions of the Court of Appeals in Albano and in Menor, including its denial of their separate petitions for reconsideration *en banc*, are set forth in full in the *Appendix*.

IV. LEGAL ARGUMENT

There are two fundamentally important cross-jurisdictional issues of federalism presented in both the Albano and the Menor appeals which only this Court can finally settle, neither of which, although fully briefed, did the Ninth Circuit Court of Appeals' panel either address or even apparently research below:

The first such jurisdictional issue concerns the supremacy of federal consumer laws, such as TILA, which Congress has specifically enacted to control predatory interstate banking practices, and whether those federal statutes can be modified or curtailed, and if so, to what degree, by state judicial doctrines, as has occurred here.

The second such jurisdictional issue concerns the extent to which federal courts should interpret for themselves state law doctrines which are unclear, or whether they should certify such questions to the highest courts of the States for decision first instead.

1. As a matter of preemptive federal legislation, Section 1636 of Title 15, by express language, does not permit the extinguishment of a borrower's extended right to cancel, notwithstanding a state foreclosure decree, except upon either a sale of the property or the expiration of three years following consummation of the original loan transaction.

"The avowed purpose of the Consumer Credit Protection Act, enacted in 1968 after eight years of Congressional consideration," it important to recall, "was . . . to remedy unscrupulous and predatory creditor practices throughout the nation," N.C. Freed Co., Inc. v. Board of Governors of the Federal Reserve

System, 473 F.2d 1210, 1214 (2nd Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

"However, Congress left the door open for states to create their own truth-in-lending acts, so long as the disclosures required were substantially the same as those of TILA," and "the Federal Reserve Board (the 'Board') is given the option to determine whether a particular state's laws" comply, Myers v. Federal Home Loan Mortgage Co., 174 B.R. 122, 125 (Bk. D. Mass. 1994).

a. Federal law has preempted the mortgage foreclosure field with respect to the protection of rescission rights following TILA violations.

The power of Congress to preempt state laws through the Commerce and the Supremacy Clauses of the United States Constitution is well established.

It has been held, for instance, by contrast, that there is no corresponding "important state interest" in a state foreclosure action involving purely private rights, Rowland v. Novus Financial Corp., 949 F. Supp. 1447, 1457 (D. Haw. 1996).

In 1968, when Congress rightfully responded to numerous horror stories of lender overreaching and passed various consumer legislation, including TILA, designed to afford protection to borrowers faced with confusing and frequently deceptive loan and mortgage terms and documentation, it expressly authorized the awarding in appropriate cases of both actual and statutory damages and gave consumers the right of rescission, as "private attorneys general," to place checks on numerous, notorious banking abuses.

Since then, both our federal and our state courts have grappled with the various cross-jurisdictional issues that have understandably arisen, especially

where lenders, as here, bring suit first for foreclosure in state court and borrowers file separate federal actions.

b. Federal courts have increasingly recognized the preemptive importance of TILA provisions by overriding state *res judicata* doctrines in order to protect a borrower's federal TILA consumer rights.

At first, some federal district courts refused to allow such federal consumer suits if a foreclosure action had been filed first in state court, based upon *res judicata* doctrines and Rule 13 compulsory counterclaim theories, *see, e.g.*, Carter v. Public Finance Corp., 73 F.R.D. 488 (N.D. Ala. 1977), while other district courts, recognizing the unique TILA protection that was clearly intended by Congress, held otherwise, *see, e.g.*, Daughtery v. First Bank & Trust, 435 F. Supp. 218 (N.D. Ind. 1977).

More recently, however, there has been an avalanche of federal and state court decisions in all Circuits and in state court jurisdictions alike holding TILA claims to be superior to state law doctrines, thus permissive counterclaims in nature, in order to protect the consumer's federal statutory rights, all of which decisions the Ninth Circuit panel deciding Albano and Menor appears to have ignored, although the expressed rationale for such decisions has admittedly often been confusing; *see, e.g.*:

Brady v. C.F. Schwartz Motor Co., 723 F. Supp. 1045 (D. Del. 1989) (TILA claims permissive and state court judgment in favor of lender on note was held not *res judicata*);

Elliot v. ITT Corp., 150 B.R. 36 (N.D. Ill. 1992) (debtor's failure to dispute creditor's claim in bankruptcy and to list TILA claim, and confirmation of

plan, did not preclude debtor from asserting TILA claim in bankruptcy later);

In re Fryer, 172 B.R. 1020 (S.D. Ga. 1994) (creditor's motion to dismiss TILA claim based on *res judicata* was denied);

In re Marshall, 121 B.R. 814 (C.D. Ill. 1980) (TILA claim held not a compulsory counterclaim and thus not lost in earlier action);

Acquino v. Public Finance Consumer Discount Co., 606 F. Supp. 504, 511 (E.D. Pa. 1985) (holding "to prevent a later recovery for a rescission violation would undercut the penalty Congress clearly decided to impose");

Sosa v. Fite, 408 F.2d 114 (1974) (residence actually sold at state foreclosure sale to a third party, but borrower thereafter still permitted to sue in federal court to enforce rescission rights under TILA and total rescission nevertheless was ordered); and

Hart v. Clayton-Parker, 869 F. Supp. 774 (D. Ariz. 1994) ("every court of appeals to consider the issue . . . has concluded that TILA claims and underlying loan transactions do not arise out of the same transaction or occurrence and are thus not subject to the compulsory counterclaim provision of Rule 13(a)").

Decisions this past decade in federal district courts in the Ninth Circuit as well, at least until the ones now complained of below, have closely mirrored the modern trend, *supra*, allowing TILA rescission claims to be brought in federal courts even though borrowers had either earlier lost state court foreclosure suits or had even earlier prevailed in TILA material nondisclosure suits of their own in state court seeking only damages, or had existing state foreclosure suits still ongoing while not maintaining TILA rescission

counterclaims there but instead asserting affirmatively TILA claims in federal district courts.

Thus, in Smith v. Wells Fargo Credit Corp., 713 F. Supp. 354 (D. Ariz. 1989), cited below as however not controlling, that Ninth Circuit district court held that a previously successful state court adjudication of a TILA disclosure violation by a borrower did not bar a later federal suit for rescission under TILA, specifically deeming such a counterclaim to be permissive, in direct reliance upon an earlier *en banc* decision of the Ninth Circuit Court of Appeals in Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) (see 713 F. Supp. at 358), which the Albano and Menor merits panel below did not even cite or discuss.

And, the district court in Hawaii itself earlier, in Rowland v. Novus Financial Corporation, 949 F. Supp. 1447 (D. Haw. 1996), held a TILA suit in federal court is not barred even if there is an ongoing, prior state court foreclosure action in which the borrower was not maintaining any state court counterclaims, despite the possibility of conflicting results between jurisdictions.

c. A prior state court foreclosure decree does not extinguish a borrower's TILA rescission rights where cancellation occurs prior to public auction and confirmation of sale, since *res judicata* is not controlling because the two sets of claims have distinguishing elements and the evidentiary facts necessary to prove each are essentially different.

Judge Rosenberg, for instance, when confronted with the same identical issue as here, rendered his decision in Smith, *supra*, based his contrary conclusions, unlike the panel that decided Albano and Menor, although it referenced his decision in Smith in the Albano Opinion itself, on the earlier *en banc* Ninth Circuit Court of Appeals decision in Piatt,

supra, explicitly recognizing that *res judicata* principles barring re-litigation were not controlling, as Piatt made clear, "where the legal theories of the claim were different under federal law than they were under state law," 713 F. Supp at 358, as when "the claims themselves have distinguishable elements from the cause of action that was litigated in state court, and the evidentiary facts necessary to prove the claim were distinct from those presented in state court," 773 F.2d at 1035, and only after District Judge Rosenberg had additionally conducted a careful review of TILA rescission decisions in other Circuits as he carefully explained in his decision in Smith.

Judge Rosenberg, thus applying Piatt, unlike the panel below, expressly found that "the res judicata doctrine is viewed in a different light when the [federal] right to rescission is involved because this right has a substantive quality," 713 F. Supp. at 358, and that 'the legal issue of rescission is a new cause of action which was not litigated in the state court" in the customary have-you-paid-your-mortgage foreclosure case, 713 F. Supp. at 359.

What completely contradicts the panel's decision here is the fact that in Smith, 713 F. Supp. at 355, and in another federal case upon which it also relies, Laubach v. Fidelity Consumer Discount Co., 77 B.R. 483 (Bk. E.D. Pa. 1987), instead of any consideration or reliance being placed upon the vagaries of each State's apparent *res judicata* laws, it was in stark contrast held that *res judicata* did not even bar a subsequent TILA rescission claim in federal court after a notice of cancellation was sent, even though in both Smith and Laubach the borrowers had filed a counterclaim in state court seeking damages for TILA disclosure violations first (as opposed to rescission claims) and had lost summary judgments; whereas in Menor and in Albano, no TILA claim whatsoever of any nature was ever even presented or litigated in any state court anywhere – only a default taken against

Albanos and Menor on purely state-law mortgage default-in-payment claims.

Since Smith, every federal court that has examined that issue has held, except for the panel below, that the federal TILA rescission right survives a foreclosure judgment and even a sale and even a subsequent loss of the property no less.

Thus, in In re Apaydin, 201 B.R. 716, 721-722 (1996), the United States Bankruptcy Court for the Eastern District of Pennsylvania viewed federal TILA rescission claims more consistently with the reasoning found in the Ninth Circuit Court of Appeal's *en banc* decision in Piatt, and totally differently than has the panel now done in Albano and in Menor:

> The right of rescission does not emanate from plaintiffs' mortgage such that it disappears after the mortgage is merged with the judgment. Rather, plaintiffs rescission rights arises [sic] from TILA and the regulations promulgated thereunder. 15 U.S.C. 1635; 12 C.F.R. 226.23. Thus, the fact that the mortgage no longer exists is immaterial to whether the plaintiffs retain the ability to rescind Citicorp's security interest in their house. This right continues to exist based on TILA which, unlike the terms of plaintiffs' mortgage, is unaffected by the entry of the [foreclosure] judgment.
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> * * * *
>
> According to TILA itself, the right to rescind a transaction terminates only after the passage of three years or the sale of the property. 12 C.F.R. 226.23(a)(3). The TILA statute and regulations are, in fact, clear and unambiguous on this point.

Other federal courts recently have similarly viewed TILA rescission rights as not affected by state mortgage foreclosure judgments, the latest case precedent being the highly persuasive decision of Judge Schmetterer in Walker v. Contimortgage, 232 B.R. 725 (N.D. Ill. 1999) (holding that an earlier obtained state court foreclosure judgment did not extinguish the federal TILA right to rescind within the extended three-year period where, as in Albano and in Menor, no sale had yet taken place).

In fact, there is not a single published opinion in all of American law supporting the Albano and the Menor panel's narrow reading of the survivability of federal TILA rescission rights as here.

Indeed, until recently even in the District of Hawaii it had long been the view that federal TILA rescission rights survived a Hawaii state foreclosure judgment, notwithstanding state *res judicata* doctrines, so long as the extended three-year period had not yet expired.

For instance, in the celebrated Kahalehau case in the district court in Hawaii, its "Order Denying Plaintiff's Motion For A TRO," filed March 28, 1994, in Civil No. 94-00164 ACK, in the United States District Court for the District of Hawaii, appearing in the appellate record of yet another related TILA/*res judicata* case awaiting decision by the Ninth Circuit Court of Appeals, presumably to be decided based on Albano as well, if not reverse, Kama v. Ameriquest, Case No. 00-17240, Judge Kay expressly held there, consistent with the reasoning found in Smith and in Piatt a few years earlier, that TILA claims were indeed "permissive" in Hawaii and that a prior Hawaii state court foreclosure judgment in which the TILA claims were neither considered nor addressed in the state court's findings of fact or conclusions of law was not *res judicata*, contrary to the new view of the panel

below which now would bar a subsequent action by the borrower in federal court seeking to rescind:

> The law in this District is that the debtor's TILA claim against a creditor and the creditor's foreclosure claims against a debtor involve different issues of law and therefore are not compulsory counterclaims, even though they may arise out of the same transaction. Dias v. Bank of Hawaii, 764 F.2d 1292, 1294 n.1 (9th Cir. 1985); Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116, 1122 & n.20 (D. Haw. 1976). . . . . Hence, this Court finds that Plaintiff's TILA claim is a permissive counterclaim, and therefore she was not required to raise it in the state-court proceeding.

It was even shown to the district court below and on appeal, in both Albano and in Menor, that the Honolulu circuit court foreclosure judge had held as late as 1998, as Judge Kay had in Kahalehau, *supra*, in a state court case that a TILA rescission was allowed in state court even though not pled during the foreclosure part of the case, and after a foreclosure decree had already been granted and not appealed, which brought this revealing response from the district court embodied in the written Menor dismissal order, who preferred to ignore, as the panel in Albano and in Menor similarly did, the written, *albeit* unpublished, opinion of the Honolulu state foreclosure judge sitting but one block away from the federal court, in favor of the district court's own view of what Hawaii's *res judicata* law was supposed to be:

> Plaintiff also refers to a recent unpublished order from the Circuit Court of the First Circuit, State of Hawaii [Gilman] which held that a claim for rescission under the TILA was a permissive counterclaim and allowed to proceed. The state court bases its decision upon . . . Smith . . . . This Court disagrees with the conclusion in Gilman . . . .

There is, moreover, nothing new in such a "federal supremacy" approach as that taken in Piatt and in Smith, as this Court in a somewhat related context in Grogan v. Garner, 498 U.S. 279 (1991), made clear.

In Grogan, this Court was faced with apparent tension, as here, between the viability of a special federal right versus the *res judicata* effect of a prior state court judgment -- the question there being whether under federal bankruptcy laws a state court judgment involving a finding of "actual fraud" against a Chapter 11 Debtor was dischargeable if the burden of proof underlying the state court judgment, otherwise *res judicata*, was not "clear and convincing evidence" but the lesser "preponderance" standard.

The actual decision in Grogan, adopting the lesser standard as what Congress intended, is not directly relevant here. Instead, what is relevant in Grogan is that this Court in its reasoning proceeded in much the same manner as did the Ninth Circuit Court of Appeals *en banc* in Piatt; that is, this Court recognized that the federal issue was different than the issue decided in state court by the state court judgment, and that it had to make an independent interpretation of Congressional intent to establish a uniform rule for the protection of a special federal right

– in that case, debtor dischargeability, and in our case, borrower cancellation.

One passage of the Opinion in Grogan is especially instructive here: "Congress amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the validity of the underlying claim," 498 U.S. at 289.

That is precisely one of the central points in this Appeal.

There is a difference between whether a state court has found in a mortgage foreclosure case that there has been a default in payment of a mortgage loan by a borrower, thus for state purposes finding the underlying mortgage "valid," and the entirely separate issue as determined in Smith and in Apaydin and in Walker, *supra*, for instance, when presented to a federal court as to whether that same borrower has nevertheless exercised his or her federal TILA rescission right within the extended three-year option period under this Court's decision in Beach, *supra*, thus trumping the state court foreclosure judgment as a result of independent and overriding federal interstate commerce and banking policy concerns.

d. This Court's 1998 bellwether decision in Beach v. Ocwen Federal Bank provides a consistent rationale for resolving existing conflicting TILA res judicata decisions in this important area of federal consumer law.

To many, since both a lender's and its borrower's claims appear to arise out of the same transaction, the modern trend has seemed to conflict with traditional *res judicata* concepts; hence, although the modern view is to protect TILA claims from *res judicata* extinguishment, there has not yet fully emerged in the cases cited a truly consistent rationale

for reconciling the various conflicting decisions – most courts still painting, as it were, with a very broad brush -- the vast majority of state and federal courts now holding TILA claims to be "permissive" in order to defeat *res judicata* arguments, while a few jurisdictions still continue to find them "compulsory" in the absence of any previous bright-line rationale.

Much of the past confusion, it is submitted, may have resulted from a failure to recognize that where a foreclosure action has been filed first in state court, in certain situations a borrower's TILA claim subsequently in federal court may indeed be "permissive," while in other situations it might more properly be viewed as "compulsory," depending upon which *res judicata* principles are actually applicable.

Such common *res judicata* situations, for instance, often are of two varieties: (1) where the TILA claim has already been litigated in state court and (2) where the TILA claim existed at the time that the foreclosure suit was served and a cancellation notice sent, but was not included as a counterclaim with the borrower's pleadings.

What concerns us here, however, is a third type of situation: (3) where the TILA claim was not raised in the prior suit and the cancellation notice was not sent prior to the service of the foreclosure complaint or prior to the entry of the state court foreclosure judgment, and it is in the latter set of circumstances where the decision of this Court in Beach, *supra*, could finally provide a consistent *res judicata* rationale in TILA actions.

For, prior to this Court's 1998 decision in Beach, the TILA three-year extended right to rescind was everywhere looked upon as a "statute of limitations," during which period a borrower had to exercise his or her right of rescission -- the cause of action, as it were, having started to accrue at the time of the TILA

violation at loan consummation when the loan was actually made.

It was only in a defensive posture, opposing foreclosure, that the courts, before Beach was decided, had considered the borrower's defense to be one of "common law recoupment" -- which tolled the statute of limitations indefinitely to allow for a TILA counterclaim beyond the three-day or three-year periods.

Thus, prior to Beach, the borrower's claim for rescission as well as for damages was conceptualized as arising out of the same loan transaction, invoking -- and logically satisfying the dual requirement of -- Rule 13, so as to be viewed, as the district court saw it below, as "compulsory," the claim both arising out of the same transaction and being ripe at the time the complaint was served.

However, Beach held that the TILA rescission right was a right to be exercised or elected, identical to an option, or lost, within the extended three-year period -- and was not a statute of limitations where the right to rescind had accrued at the time of the TILA violation at loan consummation, the key distinction underlying Beach.

The significance of that holding now provides us with, it is submitted, a consistent rationale for the new modern trend in both the federal and state jurisdictions which now consider a TILA rescission claim to be *permissive*, for it is only when the Beach right to rescind is actually exercised and the lender refuses to terminate the security interest that the cause of action of the borrower to enforce his or her cancellation arises, and that could be before or after a state court foreclosure suit is filed, depending upon whether the TILA rescission right is timely exercised before or after the state foreclosure suit is filed and served.

In Albano and in Menor, that right was exercised, to render it a *permissive* counterclaim, not only after the state foreclosure suit was filed, but also after the foreclosure judgment was entered, but before any public auction or any confirmation of sale.

The intent of Congress in enacting Section 1635(f) is clear from the plain language of the statute itself:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first . . . .

Once the rationale underlying Beach is therefore thus applied to such Rule 13-related TILA cases as here, it becomes increasingly easier to understand and to intelligently sort through prior and often conflicting federal and state court precedents, *supra*, as that rationale serves to highlight a variety of factors that may properly determine whether a lender's or a borrower's separate suit -- after a state court filing – should be considered as either permissive or compulsory for *res judicata* purposes – which will logically depend, for example, at what stage in the process a cancellation notice was sent, whether the lender or the borrower sued first, whether a default in the payment of the loan actually occurred, and/or whether the borrower is seeking rescission and/or damages.

It could, for instance, clearly be either, depending upon the various timing of the cancellation notice.

Thus, under this compromise approach, *res judicata*, for instance, may or may not be a bar to a subsequent federal TILA rescission action.

There are clearly a myriad of possible decision scenarios, and the recent cases, except for the decisions below, clearly illustrate those logical differences.

For instance, federal courts have held that TILA rescission actions are not barred even if there has been prior TILA litigation which itself did not involve rescission but involved damage claims, White v. World Finance of Meridian, Inc., 653 F.2d 147 (5th Cir. 1981); In re Laubach, *supra*.

2. Hawaii case law does not automatically extinguish a borrower's extended TILA right to cancel merely because of a prior state foreclosure decree where a borrower's TILA rescission claims have not been pled or actually adjudicated there.

The panel in Albano and in Menor not only ignored the actual decisions of the Hawaii state trial judges, such as in Gilman, *supra*, submitted to it, but misread Hawaii appellate precedent as well.

a. No Hawaii appellate case has ever held that TILA rescission claims are compulsory and lost if not pled in defense of a state foreclosure action.

The Albano and Menor panel interpreted the decision of the Hawaii Supreme Court in Pacific Concrete Federal Credit Union v. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980), to hold that in Hawaii TILA claims are "compulsory," since they supposedly arise out of the same transaction as the lender's foreclosure action brought for nonpayment of the underlying loan.

However, the panel below overlooked the fact that the borrower's counterclaim in Pacific Concrete was not a rescission claim at all, but a Section 1640 damage claim, and since all damage claims based

upon mathematical miscalculations at the time the loan was consummated logically arise out of the same transaction (the first requirement, *supra*, of Rule 13) as does any default in loan payments itself, and exists as a ripe claim when the foreclosure suit is originally served (the second requirement, *supra*, of Rule 13), it is correctly viewed as "compulsory."

However, a rescission election pursuant to Beach, *supra*, that is not made by a borrower until after a state foreclosure suit has been filed against him or her would not satisfy either of the two requirements of Rule 13, and would thus be classified as "permissive" in Hawaii, notwithstanding Pacific Concrete, a result consistent with the state court's decision in Gilman, *supra*, as well.

It is ironic, indeed, that the panel below turned the decision of the Hawaii Supreme Court in Pacific Concrete squarely on its head, to favor the lender, since that 1980 decision was a landmark holding, explicitly seeking to protect and to extend consumer's rights in Hawaii under the century-old Hawaii doctrine of "common law recoupment," by recognizing that disclosure mistakes in the terms of a loan arose out of the same transaction -- not to make TILA Section 1635 rescission claims "compulsory," but to provide for related TILA Section 1640 damage claims as offsets that had already ripened by tolling the statute of limitations so that lenders could not wait adroitly to foreclosure until the statute of limitations had run on a borrower's claims, in order to discipline overreaching lenders so as to avoid undercutting the aims of such consumer protection laws, 62 Haw. at 342.

Similarly, the panel's conclusion that Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969), in any way created a state law doctrine that bars a subsequent TILA rescission claim in federal court on *res judicata* grounds was another unfortunate misreading of Hawaii law, since Ellis involved a non-TILA, common law

rescission claim that was both part of the subject transaction there and had accrued at the time the state court foreclosure action was filed in Ellis, which within the Beach *res judicata* rationale suggested, *supra*, would indeed be "compulsory," but would have nothing to do whatsoever with extinguishing an unpled and unadjudicated TILA statutory rescission claim, and clearly not in any way would be determinative here.

The panel has additionally misread Fuller v. Pacific Collections, Inc., 78 Haw. 213, 218-19, 891 P.2d 300, 305-306 (App. 1995), which addressed, *inter alia*, the preclusive effect of a state court default judgment.

The Fuller Court, after distinguishing as a matter of state law between the doctrine of *res judicata* and the more limited doctrine of collateral estoppel, 78 Haw. at 218-219, first found "a default judgment to be a final judgment to which collateral estoppel [and not *res judicata*] applies," and then went on to hold in that case that "the doctrine of collateral estoppel would apply to bar relitigation of the amounts listed as owing on all four district court judgments," 78 Haw. at 219, since those amounts were stated in the pleadings to which the default was applied.

The panel decision apparently mistakenly concluded from that that Fuller held that "'[A] default judgment is a final judgment to which' res judicata principles apply," when in fact that conclusion is nowhere found in Fuller.

The passage quoted by the panel from Fuller actually states that only the doctrine of collateral estoppel applies to default judgments in Hawaii, and only goes on to make a point about an exception for void judgments by analogizing to void judgments as an exception to *res judicata*, citing with a "Cf." prefatory signal a 1985 Hawaii Supreme Court case only applicable by analogy, Matsushima v. Rego, 67 Haw. 556, 559, 696 P.2d 843, 846 (1985), itself however

making clear that default judgments in Hawaii cannot determine issues beyond those actually pled.

Had the panel researched further, it would have discovered that the distinction between *res judicata* and collateral estoppel, especially in a default judgment context, is immense and alive in Hawaii, as the same Fuller Court itself explained in more detail earlier in the controlling authority it itself cites in its Fuller opinion, 78 Haw. 213 at 219, In re Dowsett, 7 Haw. App. 640, 644-645, 791 P.2d 398, 401-402 (1990) ("collateral estoppel also requires that, in the prior action, the issues sought to be precluded 'have been both actually litigated and actually decided'"), reasoning strikingly similar to that found in Piatt – yet also overlooked and unaddressed in the panel's published *Opinion* in Albano which produced the *Memorandum* affirmance in Menor.

b. Far from encouraging early extinguishment of consumer mortgage defense claims on procedural grounds, the Hawaii appellate courts in recent years have actually been pioneering a new series of innovative judicial protections for mortgage borrowers in Hawaii which even go way beyond any such consumer protections which are recognized in our federal courts.

There have been a flurry of new appellate decisions in Hawaii in recent years, three in particular, intended to protect borrowers and related TILA rights, in which the undersigned, as in Gilman, *supra*, was the borrowers' trial and appellate counsel, which suggest that the panel below has not keep abreast of appellate developments in that State.

For instance, in GE Capital Hawaii, Inc. v. Miguel, 92 Haw. 236, 990 P.2d 134 (App. 1999), the Hawaii Intermediate Court of Appeals, citing Pacific

Concrete approvingly, imposed upon Hawaii trial courts new Rule 56(e) summary judgment general ledger restrictions, specifically rejecting less demanding federal interpretations of Rule 56(e), despite its now being an identically worded civil practice rule in both jurisdictions.

And, in Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000), the Hawaii Supreme Court made it easier for Hawaii borrowers, among other new evidentiary rights also granted in Keka, to assert a TILA notice-of-right-to-cancel *non*delivery claim in defense of summary judgment and the contrary rebuttable presumption under federal law.

And, just weeks ago, the Hawaii Intermediate Court of Appeals, in GE Capital v. Yonenaka, 96 Haw. 32, 25 P.3d 807 (App. 2001), went even farther than any state or any federal court has yet gone to protect mortgage borrowers, holding that it would overturn any foreclosure summary judgment on appeal where a lender did not submit into evidence its loan general ledger, even if, contrary to all applicable federal appellate precedents, the borrower at the summary judgment hearing had not objected to the foreclosure.

Perhaps the panel below should have weighed the supposed "robustness" of Hawaii's *res judicata* doctrine with the Hawaii appellate court's recently demonstrated robust foreclosure defense public policy.

c. The decision of the panel below not only is in conflict with the decisions of the Hawaii trial and appellate courts, *supra*, and every federal court that has addressed the issue in recent years, *supra*, but will likely spawn great uncertainty and create great mischief to borrowers everywhere until these important cross-jurisdictional issues are resolved and settled by this Court.

Unlike the general, ambiguous language contained in the summary judgment order and foreclosure decree, *supra*, entered by the Second Circuit Court on Maui in Albano, the First Circuit Court in Honolulu in Menor, as did the First Circuit Court also in Kama, supra, clearly stated in its summary judgment order and foreclosure decree, *supra*, that the foreclosure was not to be considered final (or *res judicata* apply), depriving Menor of title, until the auction was confirmed and the sale was actually approved by the state trial court and had actually closed, which was of course after Menor also had sent her timely cancellation letter to her lender as TILA requires and allows.

Thus, the panel's conclusion that in Hawaii there is a so-called "robust" application of the doctrine of *res judicata*, at least in the context of a mortgage foreclosure case is further belied by the actual wording of the foreclosure decree in Menor and by the highly ambiguous "except as otherwise ordered by this Court" language in the foreclosure degree in Albano, as quoted earlier in this Petition, at page 6.

Moreover, notwithstanding the amazing clarity with which the panel found such "robust" *res judicata* doctrines in its view to exist in the case law in Hawaii, Hawaii local practitioners and academicians -- who have recently taken the time to closely study the last three decades of Hawaii decisions which have attempted to apply both *res judicata* and collateral estoppel concepts -- have come to a completely different view than has the panel below, finding, for example, Hawaii's *res judicata* case law somewhat less than robust, instead to be "a tangled web of incoherence," and "Hawaii's long history of confusing decisions . . . a jumbled morass in the law," Endo, *Res Judicata And Collateral Estoppel In Hawaii: One Of These Things Is Not Like The Other*, 3 Hawaii Bar Journal 1, at 1 and 27 (1999).

Absent a precise definition and explanation from the panel as to how precisely to identify and to apply different degrees of "robustness," as it were – if that is to be declared to be the new test in federal court which is going to control whether a federal consumer right is alive or not as applied to differentiate among varying *res judicata* and collateral estoppel doctrines within ultimately all of the fifty States and the District of Columbia, an interpretative test which has yet, perhaps thankfully, to find its way into Black's Law Dictionary, and absent intervention by this Court now, important TILA protections enacted by Congress might literally drown in a quagmire of hopelessly divergent district by district and circuit by circuit holdings.

For instance, absent review here, it will now clearly depend not upon the facts of a particular case but only upon the jurisdiction of suit whether borrowers can exercise federal TILA rescission rights successfully; thus, in the operative circumstances presented here – on the same identical set of facts -- from now on – if not reviewed – borrowers seeking the assistance of federal courts might lose their homes in Hawaii (Albano), but not in Arizona (Smith), and not in Pennsylvania (Apaydin), and not in Illinois (Walker), and perhaps nowhere else but Hawaii.

Or, much worse, is the availability of so important a federal right to be allowed by this Court to vary even among counties within States within Circuits, depending upon, for instance, as we have learned, the wording of a particular county court's foreclosure decree, such as the differing language, *supra*, found in Albano on Maui, as opposed to that found in Menor in Honolulu? And what about the related, pending Kama Appeal, presumably headed for a different Ninth Circuit merits panel, and the differing wording of the summary judgment order and decree of foreclosure there?

It is in the context of such an otherwise potential and disquieting lack of uniformity in application and

availability that federal rights are frequently interpreted by federal courts to enjoy an independent and uniform status in order to carry out the intentions of Congress under the Constitution's Supremacy Clause.

Judge Rosenberg in Smith was right.

d. The decision whether Hawaii case law does or does not automatically extinguish a borrower's extended TILA right to cancel because of a prior state foreclosure decree where a borrower's TILA rescission claims have not been pled or actually adjudicated there, should be -- and ultimately will have to be -- decided by the Hawaii Supreme Court and not by this Court which should avoid the possibility of conflicting decisions.

At the very least, should this Court decide that there is no federal preemption for TILA rescission claims, the *res judicata* issue should be certified by this Court for decision by the Hawaii Supreme Court, pursuant to Rule 13 of the Hawaii Rules of Appellate Procedure, the relevant provisions of which are set forth in the *Appendix* to this Petition, in the absence of any "clear controlling precedent in the Hawaii judicial decisions" to support the conclusions of the panel below and out of respect for the right of a State to interpret its own laws.

V. CONCLUSION

For all of the above reasons, Albanos and Menor pray that this Court will grant their separate Petitions for Writs of *Certiorari*, jointly review the decisions below, and reverse the dismissals of their individual federal Truth-In-Lending complaints so that they may have their day in court on the merits of their

cases and the full benefit of the consumer rights afforded them by the United States Congress and the Constitution of the United States of America.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel for Petitioners
Warren Y.S.C. Albano and
Caroline C.S. Albano, and
for Petitioner Petra Menor

Honolulu, Hawaii
August 15, 2001

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APPENDIX

1. Published Opinion Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed March 30, 2001

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Warren Y.S.C. Albano; Caroline C.S. Albano,	)	No. 99-16109 D.C. CV-97-00247-SPK
Plaintiffs-Appellees,	)	
v.	)	OPINION
Norwest Financial Hawaii, Inc.,	)	***Filed 3/30/01***
Defendant-Appellant.	)	

Argued and Submitted February 12, 2001

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge Fernandez

FERNANDEZ, Circuit Judge:

Warren Y.S.C. Albano and Caroline C.S. Albano appeal from the district court's granting of the motion of Norwest Financial Hawaii, Inc., for summary judgment. The district court determined that the doctrine of res judicata barred the Albanos' Truth in Lending Act claim for rescission of a real estate loan transaction with Norwest. See 15 U.S.C. §§ 1601-1667f (TILA). We affirm.

BACKGROUND

On March 15, 1994, the Albanos obtained a loan from Norwest which was secured by a mortgage on real property, which may have been the Albanos' principal residence.[1] At a later date, the loan was refinanced with Norwest and continued to be secured by the real property.

Thereafter, the Albanos defaulted and Norwest commenced judicial foreclosure proceedings on May 26, 1996. There is no dispute that the Albanos received notice of those proceedings. However, they failed to appear, their default was entered, and on January 13, 1997, the Hawaii Circuit Court issued findings of fact and conclusions of law, and entered judgment of foreclosure against them. It declared that the mortgage was valid, that it was foreclosed, and that the Albanos were "perpetually barred of and from any and all right, title, and interest in the mortgaged property." The judgment was declared to be final. The Albanos did not appeal.

Then, on March 12, 1997, the Albanos purported to rescind the 1994 loan on the basis that Norwest had not complied with TILA. See 15 U.S.C. § 1635. Norwest did not agree, and confirmation of the actual sale of the mortgaged property took place on August 19, 1997. However, on March 14, 1997, the Albanos had commenced this action. The district court ultimately determined that they could not maintain the action because they had not raised their TILA claim in the state foreclosure proceedings, although they could have done so. Thus, said the court, this action was barred by the principle of res judicata. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the TILA claim pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment on the basis of res judicata (claim preclusion) de novo. *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 283 (9th Cir. 1997).

DISCUSSION

[1] The Albanos had the opportunity to participate in the state court proceedings that resulted in a judgment against them. We must, of course, "'give the same preclusive effect to a state-court judgment as another court of that State would give [to it].'" Int'l Evangelical Church v. Church of the Soldiers, 54 F.3d 587, 590 (9th Cir. 1995) (citations omitted). Therefore, we must look to the law of the State of Hawaii in order to determine the res judicata effect of the foreclosure judgment. See *Migra v. Warren Guy Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56 (1984); *Sunkist Growers*, 104 F.3d at 283; *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir. 1990). Under the law of Hawaii:

> The doctrine of *res judicata* basically provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter and precludes the relitigation not only of issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided."

Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (Sup. Ct. 1969) (citations omitted). In Hawaii the doctrine is applied in a robust way. That is based upon the Hawaii Supreme Court's insistence that parties should be spared unnecessary vexation, expense, and inconsistent results; that judicial resources shall not be wasted; and that the "legal efficacy" of final judgments shall not be undermined, but rather that final determinations "by competent tribunals shall be accepted as undeniable legal truth." *Id.* at 57, 451 P.2d at 822. Thus, while everyone is given the opportunity to present a case, that is "limited to one such opportunity." *Id.*

To serve those ends, the courts of Hawaii ask three questions when they seek to determine whether res judicata should apply to a case. Two of those questions are: "Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Morneau v. Stark Enters., Ltd.*, 56 Haw. 420, 424, 539 P.2d 472, 475 (Sup. Ct. 1975). Those two elements are met in this case. Clearly there was a final judgment by the state circuit court, which was not appealed. See *Kauhane v. Acutron Co., Inc.*, 71 Haw. 458, 464-65, 795 P.2d 276, 279 (Sup. Ct. 1990); see also *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992). It is equally pellucid that the Albanos and Norwest were parties to the state court foreclosure proceeding.

The other question asked by the courts in Hawaii requires a bit more analysis and discussion. It is: "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" Actually, when applied in the context of claim preclusion in Hawaii, this means that when a claim concerns the same subject matter, the doctrine applies if the issues "could have been raised in the

earlier state court actions." *Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996); *see also Santos v. Hawaii, Dep't of Transp.*, 64 Haw. 648, 652-53, 646 P.2d 962, 965-66 (Sup. Ct. 1982) (per curiam); *Aloha Unlimited, Inc. v. Coughlin*, 79 Haw. 527, 537, 904 P.2d 541, 551 (Ct. App. 1995); *Fuller v. Pac. Med. Collections, Inc.*, 78 Haw. 213, 218-19, 891 P.2d 300, 305-06 (Ct. App. 1995). We recognize that the Albanos defaulted in state court, but that does not matter. "[A] default judgment is a final judgment to which" res judicata principles apply. *Fuller*, 78 Haw. at 219, 891 P.2d at 306. The only exception is for void judgments, and that does not apply here. *Id.*

[2) There can be no doubt whatsoever that the Albanos TILA claim could have been litigated in the foreclosure action. It was a defense that would have ineluctably precluded foreclosure if the Albanos' claims are meritorious. The Albanos' complaint asserts as much. Were there the slightest doubt about the Albanos ability to raise a TILA counterclaim in the state court proceedings, the Supreme Court of Hawaii has dispelled that doubt. It has held that when a party sought to assert a TILA counterclaim,

> [h]is allegations of TILA violations centered around appellee's failure to disclose fully certain aspects of the loan. These loans were the very ones that were the subject of appellee's claims . . . . [I]t seems "inescapable that credit terms are an integral part of a loan transaction." We find that appellant's claims arose out of the same loan transaction as appellee's suit and as such was a recoupment defense to diminish plaintiff's recovery.

Pac. Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 341, 614 P.2d 936, 940 (Sup. Ct. 1980) (citations

omitted). The Albanos, rather weakly, assert that in *Pac. Concrete* the provenance of the court's holding was a desire to help the debtor. Perhaps so, but legal principles often cut in two directions; if TILA claims arise out of the same transaction they do so for good or ill. The Albanos could have raised their defense in the state court action. They did not and it is now too late.[2] We do not, of course, decide what the result would be in a state where res judicata principles are enunciated or applied in a different manner. *See, e.g., Smith v. Wells Fargo Credit Corp.*, 713 F. Supp. 354, 357-59 (D. Ariz. 1989). We deal here with the preclusive effect of judgments entered in the courts of the State of Hawaii.

CONCLUSION

(3] Rights can be both powerful and transitory. If they are not asserted at the proper time, they may vanish forever. What was once puissant may become a mere simulacrum — an unreal shadow of its former self. So it is here. Once the Albanos allowed the state court to proceed to a final judgment of foreclosure against them any right they had to rescind the underlying mortgage transaction vanished. The district court did not err.

AFFIRMED.

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1. There is a dispute about whether it was the Albanos' principal residence, but for purposes of this appeal we will assume that it was.

2. In an attempt to save their position, the Albanos point to *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 118 S.Ct. 1408, 140 L. Ed. 2d 566 (1998). However, *Beach* offers them no succor. That case simply held that the TILA rescission right has a limited — three year — life. *Id.* at 419, 118 S. Ct. at 1413. That fact

merely sets out the right's maximum life span; it does not affect procedural or substantive requirements that might end its existence even earlier.

2. Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16109, filed May 17, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Warren Y.S.C. Albano; Caroline C.S. Albano,	)	No. 99-16109 D.C. CV-97-00247-SPK
Plaintiffs-Appellees,	)	
v.	)	ORDER DENYING PETITION FOR REHEARING AND
Norwest Financial Hawaii, Inc.,	)	FOR REHEARING EN BANC
Defendant-Appellant.	)	***Filed 5/17/01***

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

3. Memorandum Decision Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed April 3, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petra Menor,	) No. 99-16117
	) D.C. CV-98-00664-HG
Plaintiff-Appellee,	)
	) MEMORANDUM
v.	)
	) ***Filed 4/3/01***
Finance Factors, Limited,	)
	)
Defendant-Appellant.	)
	)

Argued and Submitted February 12, 2001

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

Petra D. Menor appeals from the district court's granting of the motion of Finance Factors, Limited for summary judgment. The district court determined that the doctrine of res judicata barred Menor's Truth in Lending Act claim for rescission of a real estate loan transaction with Finance Factors. See 15 U.S.C. 1601-16677f (TILA). In the preceding state foreclosure proceeding, Menor did not appear and raise the TILA claim.

We affirm for the reasons set forth in our opinion in Albano v. Norwest Fin. Haw., Inc., No. 99-16109, slip. op. 4085 (9th Cir. Mar. 30, 2001).

AFFIRMED.

4. Order Denying Petition For Rehearing And For Rehearing En Banc Of The Court Of Appeals For The Ninth Circuit, Case No. 99-16117, filed May 17, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petra Menor,	) No. 99-16117
	) D.C. CV-98-00664-HG
Plaintiff-Appellee,	)
	) ORDER DENYING
v.	) PETITION FOR
	) REHEARING AND
Finance Factors, Limited,	) FOR REHEARING
	) EN BANC
Defendant-Appellant.	)
	) ***Filed 4/3/01***

Before: BETTY B. FLETCHER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

5. Article I, Section 8, Clause 3
Of The United States Constitution

The Congress shall have the Power . . .To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

6. Article IV, Section 1
Of The United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

7. Article VI, Clause 2
Of The United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8. Section 1635
Of Title 15 Of The United States Code

(a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of

the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later . . .

(b) Return of money or property following rescission. When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor . . . becomes void upon a rescission. . . .

(f) Time limit for exercise of right. An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor . . . .

9. Section 1738
Of Title 28 Of The United States Code

. . .[State] Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

10. Rule 13 Of The Hawaii Rules Of Appellate Procedure

(a) When certified. When a federal district court or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it as question concerning the law of Hawaii that is determinative of the cause and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court my answer the certified question by written opinion.

(b) *Contents of certificate*. The certificate provided for herein shall contain the title of the Hawaii Supreme Court and the title of the cause in full, and to the right thereof the words "Certified Question" and the name of the court submitting or approving the submission of the question. . . .

(c) *Preparation of certificate*. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of such federal court, it shall be certified to the Hawaii Supreme Court by the clerk of the federal court and under its official seal. . . .

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(2)

Supreme Court, U.S.
FILED
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No. 01-299

In The

Supreme Court of the United States

WARREN Y.S.C. ALBANO and
CAROLINE C.S. ALBANO,

Petitioners,

vs.

NORWEST FINANCIAL HAWAII, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States District Court and the Ninth Circuit Court of Appeals properly decided that under Hawaii law, the doctrine of *res judicata* bars a borrower's federal court lawsuit for rescission of a real estate mortgage under the Truth In Lending Act, where an earlier state court foreclosure judgment against the borrower on the same real estate mortgage was a final judgment and was not appealed.

PARTIES TO THE PROCEEDING AND DISCLOSURE UNDER SUP. CT. R. 29.6

Pursuant to Sup. Ct. R. 29.6, Respondent Norwest Financial Hawaii, Inc., nka Wells Fargo Financial Hawaii, Inc. ("Norwest") makes the following disclosures:

1. List all parent companies of said party: Norwest is a Hawaii corporation that is wholly owned by Wells Fargo Financial, Inc.; Wells Fargo Financial, Inc. is an Iowa corporation that is wholly owned by Wells Fargo Financial Services, Inc.; Wells Fargo Financial Services, Inc. is a Delaware corporation that is wholly owned by Wells Fargo & Company, a Delaware corporation.

2. List any publicly held company that owns 10% or more of the said party's stock: None.

DATED: Honolulu, Hawaii, September 19, 2001.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals in *Albano v. Norwest Financial Hawaii, Inc.*, CV-99-16109 is reported at 244 F.3d 1061. 1063 (9th Cir. 2001) (Respondent's Appendix "A"). The order of the District Court for the District of Hawaii, granting Respondent's Motion for Summary Judgment, which was the subject of this appeal is not reported. (Respondent's Appendix "B"). The order of the Circuit Court in the Second Circuit State of Hawaii, granting Respondent summary judgment against Petitioners and a decree of foreclosure is not reported. (Respondent's Appendix "C").

STATEMENT OF THE CASE

I. THE UNDERLYING ACTIONS

Petitioners Warren Y.S.C. Albano and Caroline C.S. Albano ("Petitioners") entered into a mortgage transaction on March 15, 1994 and refinanced it on July 11, 1994. Subsequently, Petitioners defaulted on their July 11, 1994 loan. On May 17, 1996, Respondent Norwest Financial Hawaii, Inc. ("Respondent"), holder of the mortgage note, filed a foreclosure suit against Petitioners in Circuit Court of the Second Circuit of the State of Hawaii. Default was entered on June 26, 1996. After a hearing on Respondent's motion for summary judgment, the court entered an order and judgment on January 13, 1997, which foreclosed the mortgage.

The state court found as a matter of fact and law that Petitioners' mortgage was "a valid first lien on the mortgaged property" and decided as a matter of law that the Petitioners were "perpetually barred of and from any and all right, title, and interest in the mortgaged property." Petitioners did not answer or appear in the foreclosure suit, did not attend the summary judgment hearing, did not appeal, and never asked the state court to vacate or reconsider its judgment. The court transferred title to the property to its appointed Commissioner on January 13, 1997. The property was subsequently sold at a foreclosure sale, and is currently owned by third parties.

In March of 1997, Petitioners separately sent Respondent notices of rescission, demanding loan cancellation pursuant to the Truth In Lending Act ("TILA"). Respondent denied the requests on the basis that TILA did not apply to the mortgage, as the mortgage was not made on Petitioners' primary residence.[1]

One of the Petitioners filed a TILA complaint in United States District Court on March 14, 1997, and the other joined on October 27, 1998. In their amended complaint, Petitioners sought rescission of their mortgage, damages under TILA, damages under the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) and relief under Hawaii Revised Statutes Chapter 480. Respondent filed a motion for summary judgment, which was granted by the District Court on January 28, 1999. The court held that

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[1] Solely for purposes of the appeal, the Ninth Circuit assumed that the loan at issue was made on Petitioners' principal residence. However, this detail was not material to the court's decision.

Petitioners' claims were barred by the *res judicata* effect of the prior foreclosure action. Petitioners appealed the decision to the Ninth Circuit Court of Appeals.

II. THE NINTH CIRCUIT OPINION

On March 30, 2001, the Ninth Circuit Court of Appeals affirmed the judgment in favor of Respondents on *res judicata* grounds, holding that the prior state court foreclosure judgment barred Petitioners' TILA action for rescission of their mortgage.

The court noted that Hawaii law determines the *res judicata* effect of the foreclosure judgment. The panel concluded that there was a final judgment on the merits, and that both parties were the same as in the prior adjudication. The only issue remaining for the Ninth Circuit was whether Petitioners' TILA rescission claim "could have been raised" in the prior foreclosure action.

The panel concluded that the foreclosure judgment was a final judgment to which *res judicata* principles apply, and that TILA claims arise from the loan transaction which is the subject of the foreclosure suit, based on Hawaii precedent. Thus, the Ninth Circuit concluded that Petitioners *could have raised* the TILA rescission claim in the foreclosure action. As the court properly determined, were Petitioners' TILA defense successful, it would have voided the mortgage and the foreclosure.

REASONS FOR DENYING THE PETITION

The proper question at issue before this Court is whether Hawaii's state *res judicata* doctrine bars a borrower's federal court lawsuit for rescission of a real estate mortgage under the TILA, where an earlier state court foreclosure judgment against the borrower on the same real estate mortgage was a final judgment which was not appealed.

Petitioners argue that the Ninth Circuit erroneously failed to construe TILA as preempting the mortgage foreclosure field as to rescission rights. Petitioners also claim that the court below erred in finding that Hawaii's *res judicata* doctrine controls in this case. According to Petitioners, the Ninth Circuit's decision "is in conflict" with, "every federal court" that has addressed the issue in recent years including this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998). Finally, petitioners claim that the Ninth Circuit misinterpreted Hawaii law.

However, despite Petitioners' characterization, the issues in this case do not implicate the Commerce Clause, the Supremacy Clause, or the issues involved in *Beach*. The Ninth Circuit decision is in accord with Hawaii legal precedent and undeniable federal principles of the Full Faith and Credit Act.

Neither the Ninth Circuit's ruling, nor the record below support the arguments presented by the Petition. Moreover, the ruling has no far-reaching implications. Rather, Petitioners attempt to make a federal issue out of what is, and always was a question of the scope of Hawaii *res judicata* law.

In sum, there is no reason for this Court to undertake the extraordinary remedy of certiorari review, because both the United States District Court for the District of Hawaii and the Ninth Circuit Court of Appeals properly held that under Hawaii law, *res judicata* bars such a lawsuit. None of the conceivably applicable considerations set forth in Sup. Ct. R. 10 – conflict among the circuits; conflict upon an important federal question with a decision by this Court, a court of appeals or by a state court of last resort; or need for an exercise of this Court's supervisory power – is implicated by the decision below. No "compelling reasons" have been presented for granting the petition.

I. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY HELD THAT A PRIOR STATE COURT FORECLOSURE JUDGMENT BARS SUBSEQUENT RESCISSION LAWSUITS UNDER TILA SECTION 1635.

A. The Court of Appeals Properly Granted Full Faith And Credit to the Hawaii State Court Foreclosure Judgment.

Petitioners do not dispute that after Respondents filed their foreclosure petition against Petitioners in state court, the Hawaii state court entered default on June 26, 1996, and granted Respondent's motion for summary judgment on January 13, 1997. The first issue addressed by the panel was whether it should give full faith and credit to the prior Hawaii foreclosure judgment.

In essence, Petitioners argue that prior foreclosure judgments should not be given full faith and credit because TILA preempts "the mortgage foreclosure field"

by allowing rescission of a mortgage when a lender has engaged in certain TILA violations. (Petition at 8).[2] In other words, Petitioners want this Court to overlook years of United States Supreme Court precedent concerning the preclusive effect of state court judgments, and turn a blind eye to the mandates of the Full Faith and Credit Act.

The Full Faith and Credit Act, 28 U.S.C. § 1738 "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state. Federal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.' " *Matsushita Elec. Indust. Co., Ltd. v. Epstein*, 516 U.S. 367, 373, 116 S. Ct. 873, 877, 134 L. Ed. 2d 6 (1996), quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982).

This Court has long determined that "in the absence of federal law modifying the operation of § 1738, the preclusive effect in federal court of [a] state-court judgment is determined by [state] law." *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56 (1984). Petitioners do not and cannot point to any provision of TILA or other federal law that modifies this Court's interpretation of the Full Faith and Credit Act.

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[2] Petitioners' argument on this point was not raised before the United States District Court, and was not addressed by the Ninth Circuit.

The Ninth Circuit declined Petitioners' invitation to disregard years of Supreme Court precedent on the issue, and disposed of Petitioners' faulty argument in one paragraph. The panel concluded that pursuant to the Full Faith and Credit Act, it should "give the same preclusive effect to a state-court judgment as another court of that State would give [to it.]" *Albano v. Norwest Financial Hawaii, Inc.*, 244 F.3d 1061, 1063 (9th Cir. 2001). For that reason, the Ninth Circuit correctly held that it must "look to the law of the *State of Hawaii* in order to determine the *res judicata* effect of the foreclosure judgment." *Id.* (emphasis added). Thus, the panel's decision is in line with this Court's prior decisions on questions of federal law.

B. The Panel Below Correctly Interpreted *Res Judicata* Principles In Accordance With Hawaii Law And Determined That Petitioners' TILA Claims Are Barred.

Petitioners' attempt to formulate their own complicated preclusion doctrines using authorities outside of Hawaii's *res judicata* doctrine is a red herring. The Ninth Circuit applied the proper standards in its *Albano* decision.

1. The Ninth Circuit's Decision Was Made On *Res Judicata* Grounds, Not The Hawaii Rule of Civil Procedure Governing Compulsory Counterclaims.

Petitioners contend that the Ninth Circuit misinterpreted and misapplied Hawaii law concerning the

doctrine of *res judicata*. Specifically, Petitioners claim that the panel interpreted the Hawaii Supreme Court's decision in *Pacific Concrete Federal Credit Union v. Kauanoe*, 62 Haw. 334, 614 P.2d 936 (1980), as holding that in Hawaii, TILA claims are compulsory counterclaims. (Petition at 21). The panel made no such holding. The Ninth Circuit's opinion in *Albano* did not mention compulsory counterclaim doctrine; rather it based its analysis and decision upon *res judicata* principles. In analyzing claim preclusion under Hawaii law, the panel noted that the test under Hawaii law is whether the claim now presented "could have been raised in the earlier state court actions." *Albano*, 244 F.3d at 1063 (citations omitted).

In order to determine whether Petitioners' TILA claim "could have been brought" in the state court foreclosure action, the panel relied upon *Pacific Concrete*'s holding that TILA claims arise out of the same transaction as creditor's collection suits. *Id.* Accordingly, the panel found that "[t]here can be no doubt whatsoever that the Albanos TILA claim could have been litigated in the foreclosure action." *Id.* The panel never discussed compulsory counterclaims in its analysis.

Thus, Petitioners' analysis of the Ninth Circuit's opinion in *Albano* renders their argument on this point simply wrong.

Furthermore, the Ninth Circuit's reliance upon Hawaii *res judicata* principles rather than a compulsory counterclaim analysis was appropriate. Application of the two doctrines does not produce identical results. In fact, in *Bailey v. State*, 57 Haw. 144, 148, 552 P.2d 365, 368 (1976), the Hawaii Supreme Court pointed out that under

Hawaii law, Rule 13(a) of the Hawaii Rules of Civil Procedure *does not* establish the same absolute bar to later claims that *res judicata* creates. *Id.* Thus, the Ninth Circuit properly based its analysis upon *res judicata* principles, not Rule 13(a), which is not germane to this Court's decision.

2. Unambiguous Hawaii Precedent Confirms That *Res Judicata* Bars Petitioners' TILA Claims.

Relying almost exclusively on the case law of other jurisdictions, Petitioners argue that *res judicata* does not apply because the foreclosure action involves different issues than Petitioners' TILA rescission claim. (Petition at 11-13). At the same time, Petitioners admit that foreclosure claims and TILA rescission suits seem to arise from the same transaction. (Petition at 17).

Regardless, as explained above, the Ninth Circuit's *Albano* decision properly rested upon Hawaii's *res judicata* doctrine. The high court of the State has held that under Hawaii law:

> [t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the [claims] which were actually litigated in the first action, but also of all grounds of claim [and defense] which *might have been properly litigated* in the first action but were not litigated or decided.

Kauhane v. Acutron Co., Inc., 71 Haw. 458, 463, 795 P.2d 276, 278 (1990) (citation omitted) (emphasis added).

Specifically, Hawaii courts engage in a three-part inquiry for *res judicata* which asks whether: (1) the claim asserted in the action in question was or could have been asserted in the prior action; (2) the parties in the present action are identical to, or in privity with, the parties in the prior action; and (3) a final judgment on the merits was rendered in the prior action. *Pedrina v. Chun*, 97 F.3d 1296, 1301 (1996).

The Ninth Circuit correctly found that the second and third elements of *res judicata* were met in this case. To begin with, the parties to this action are identical to the parties in the state court foreclosure proceeding. Moreover, there is no dispute that on January 13, 1997, summary judgment was entered against Petitioners in the foreclosure proceeding, and Petitioners did not appeal. And in Hawaii, a judgment of foreclosure and order of sale is *final and appealable* even though it contains provisions for the determination of matters incident to its administration and for disposition of the proceeds and sale. *Security Pac. Mortgage Corp. v. Miller*, 71 Haw. 65, 69, 783 P.2d 855, 857 (1989).[3]

Consequently, the only issue before the Ninth Circuit concerned the first element of *res judicata*. In this regard, the panel asked whether Petitioners' TILA claim "could have been" raised in the prior foreclosure action. *Albano*, 244 F.3d at 1064. As set forth above, the Ninth Circuit

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[3] The Ninth Circuit recognized that under Hawaii law, even a default judgment is a final judgment to which *res judicata* principles apply. *See Albano*, 244 F.3d at 1064 (citing *Fuller v. Pac. Med. Collections, Inc.*, 78 Haw. 213, 218-19, 891 P.2d 300, 305-06 (Ct. App. 1995)).

held that the Hawaii Supreme Court's decision in *Pacific Concrete Federal Credit Union v. Kauanoe*, 62 Haw. 334, 614 P.2d 936 (1980), leaves no doubt that TILA claims can be raised defensively in Hawaii foreclosure actions.

In *Pacific Concrete*, a creditor brought an action against a debtor to collect the outstanding balance owed on two loans. The debtor counterclaimed, asserting that the creditor did not meet the disclosure requirements set forth in TILA. The creditor argued that the debtor's TILA counterclaims were barred by the statute of limitations. To resolve that issue, the court had to determine whether the debtor's TILA claim arose out of the "same transaction" as the creditor's collection claim.

The creditor in *Pacific Concrete* argued that the alleged TILA violations were separate and apart from the debtor's loan obligations and that the debtor's claims involved a different statute. In its decision, the Hawaii Supreme Court examined the decisions of other jurisdictions that hold that TILA violations do not arise out of the same transaction as the original loan obligation because they are not a breach of the loan agreement. The Hawaii Supreme Court rejected the reasoning of those cases, holding that:

> [the] TILA violations centered around appellee's failure to disclose fully certain aspects of the loan. These loans were the very ones that were the subject of appellee's claims. . . . [I]t seems "inescapable that credit terms are an integral part of a loan transaction." We find that appellant's claims arose out of the same loan transaction as appellee's suit. . . .

Id. at 341; 614 P.2d at 940.

Relying on the Hawaii Supreme Court's conclusion that TILA counterclaims arise from the original loan transaction, the panel below correctly decided that Petitioners "could have" raised their TILA claim in the state court foreclosure proceeding.[4]

Petitioners do not deny that they could have raised their TILA rescission claim as an affirmative defense or counterclaim at the time of the foreclosure action.[5] Indeed, Petitioners' successful TILA rescission claim would have voided Respondent's security interest in the property and would have been a complete defense to the foreclosure action.

Therefore, in applying Hawaii *res judicata* law, the Ninth Circuit in *Albano* correctly found that Petitioners' TILA claims are barred. Hence, there are no compelling reasons for this Court to grant the Petition.

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[4] The Hawaii Supreme Court has held that a rescission claim may be brought as a defense to a foreclosure action. *See Ellis v. Crocket*, 51 Haw. 45, 57, 451 P.2d 814 (1969). However, if it is not raised in the foreclosure action, it is barred by *res judicata*. *Id.*

[5] In addition, TILA expressly authorizes borrowers to use foreclosure proceedings to raise their right of rescission. 15 U.S.C. § 1635(i). Section 1635(i) provides that a debtor may bring a TILA rescission claim based upon more stringent disclosure standards than those that apply to ordinary creditors, if the debtor exercises his rescission rights as a defense in a foreclosure action. 15 U.S.C. § 1635(i).

II. THIS CASE DOES NOT IMPLICATE *BEACH V. OCWEN FEDERAL BANK* OR THE OTHER AUTHORITIES CITED BY PETITIONERS.

In the face of overwhelming authority to the contrary, Petitioners argue that the Ninth Circuit should have utilized this Court's rationale in *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998) to apply *res judicata* principles. However, it is clear that *Beach* has no relevance to this case.

Beach concerned whether TILA's statutory right of rescission can extend beyond the three-year expiration period set forth in the statute when raised as an affirmative defense in a collection action. However, *res judicata* was *not* an issue in *Beach*. As the Ninth Circuit stated in *Albano*:

> In an attempt to save their position, the Albanos point to *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998). However, *Beach* offers them no succor. That case simply held that the TILA rescission right has a limited – three-year – life. *Id.* at 419, 118 S. Ct. at 1413. That fact merely sets out the right's maximum life span; it does not affect the procedural or substantive requirements that might end its existence even earlier.

Albano, 244 F.3d at 1064 n.2.

Moreover, the Ninth Circuit correctly discerned that the other extra-jurisdictional cases cited by Petitioners, like *Beach*, are irrelevant to the Hawaii *res judicata* issue. To address this line of cases, the Ninth Circuit in *Albano* stated "[w]e do not, of course, decide what the result would be in a state where *res judicata* principles are

enunciated or applied in a different manner." *Id.* at 1064 (citing *Smith v. Wells Fargo Credit Corp.*, 713 F. Supp. 354, 357-59 (D. Ariz. 1989). *See, e.g., In re Apaydin*, 201 B.R. 716 (E.D. Pa. 1996) (Pennsylvania decision utilizing rationale specifically rejected by the Hawaii Supreme Court in *Pacific Concrete*); *In re Laubach*, 77 B.R. 483 (E.D. Pa. 1987) (decided under Pennsylvania law); *see also, Rowland v. Novus Financial Corp.*, 949 F. Supp. 1447 (D. Haw. 1996) (Hawaii *res judicata* not an issue in case because no final judgment).

As explained above, the Ninth Circuit's decision does not implicate conflicts among the circuits, important federal questions or decisions by this Court. Therefore, this Court should disregard the numerous cases cited in the Petition which are of no utility because either they cannot overcome Hawaii Supreme Court authority, or they do not address the Hawaii *res judicata* doctrine.

III. PETITIONERS' REQUEST FOR FEDERAL "PREEMPTION" OF THE STATE COURT'S FORECLOSURE JUDGMENT VIOLATES THE *ROOKER-FELDMAN* DOCTRINE.

Petitioners ask this Court to overturn the Hawaii state court foreclosure judgment by holding that TILA preempts "the mortgage foreclosure field." (Petition at 8). However, such action is prohibited under the *Rooker-Feldman* doctrine.

Although the court below did not reach the issue, the *Rooker-Feldman* abstention doctrine prohibits a losing party in state court from seeking what essentially would be appellate review of the state judgment in a United

States District Court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 1315, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *see also Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986) ("the United States District Court, as a court of original jurisdiction, has no authority to review the final determination of a state court in judicial proceedings.")

Under the *Rooker-Feldman* doctrine, the Eighth Circuit Court of Appeals dismissed TILA claims under circumstances almost identical to those at issue here. In *Postma v. First Federal Savings & Loan of Sioux City*, 74 F.3d 160 (8th Cir. 1996), debtors brought claims in federal court alleging, *inter alia*, violations of TILA arising from a mortgage on their land. A decree of foreclosure on the mortgage had previously been entered in favor of the lender. The court held that the lower court correctly determined it did not have subject matter jurisdiction over the claims, noting that the current claims were "essentially a collateral attack in federal district court on a state foreclosure judgment." 74 F.3d at 162.

The *Rooker-Feldman* doctrine prohibits Petitioners from circumventing the prior foreclosure judgment by filing suit in federal court after they failed to appear in the state court proceeding or appeal the state court judgment. It further illustrates that there are no "compelling reasons" for granting the Petition.

CONCLUSION

For the reasons set forth herein, Norwest respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Warren Y.S.C. ALBANO; Caroline C.S. Albano, Plaintiffs-Appellants,

v.

NORWEST FINANCIAL HAWAII, INC., Defendant-Appellee.

No. 99-16109.

Argued and Submitted Feb. 12, 2001
Filed March 30, 2001

Gary V. Dubin, Dubin Law Offices, Honolulu, Hawaii, for the plaintiffs-appellants.

Bruce L. Lamon, Goodsill Anderson Quinn & Stifel, Honolulu, Hawaii, for the defendant-appellee.

Appeal from the United States District Court for the District of Hawaii; Samuel P. King, Senior Judge, Presiding. D.C. No. CV-97-00247-SP.

Before: BETTY B. FLETCHER, FERNANDEZ, and PAEZ, Circuit Judges.

FERNANDEZ, Circuit Judge:

Warren Y.S.C. Albano and Caroline C.S. Albano appeal from the district court's granting of the motion of Norwest Financial Hawaii, Inc., for summary judgment. The district court determined that the doctrine of res judicata barred the Albanos Truth in Lending Act claim for rescission of a real estate loan transaction with Norwest. *See* 15 U.S.C. §§ 1601-1667f (TILA). We affirm.

BACKGROUND

On March 15, 1994, the Albanos obtained a loan from Norwest which was secured by a mortgage on real property, which may have been the Albanos principal residence.[1] At a later date, the loan was refinanced with Norwest and continued to be secured by the real property.

Thereafter, the Albanos defaulted and Norwest commenced judicial foreclosure proceedings on May 26, 1996. There is no dispute that the Albanos received notice of those proceedings. However, they failed to appear, their default was entered, and on January 13, 1997, the Hawaii Circuit Court issued findings of fact and conclusions of law, and entered judgment of foreclosure against them. It declared that the mortgage was valid, that it was foreclosed, and that the Albanos were "perpetually barred of and from any and all right, title, and interest in the mortgaged property." The judgment was declared to be final. The Albanos did not appeal.

Then, on March 12, 1997, the Albanos purported to rescind the 1994 loan on the basis that Norwest had not complied with TILA. *See* 15 U.S.C. § 1635. Norwest did not agree, and confirmation of the actual sale of the mortgaged property took place on August 19, 1997. However, on March 14, 1997, the Albanos had commenced this action. The district court ultimately determined that they could not maintain the action because they had not raised

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[1] There is a dispute about whether it was the Albanos' principal residence, but for purposes of this appeal we will assume that it was.

their TILA claim in the state foreclosure proceedings, although they could have done so. Thus, said the court, this action was barred by the principle of res judicata. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the TILA claim pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment on the basis of res judicata (claim preclusion) de novo. *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 283 (9th Cir.1997).

DISCUSSION

The Albanos had the opportunity to participate in the state court proceedings that resulted in a judgment against them. We must, of course, " 'give the same preclusive effect to a state-court judgment as another court of that State would give [to it].' " *Int'l Evangelical Church v. Church of the Soldiers*, 54 F.3d 587, 590 (9th Cir.1995) (citations omitted). Therefore, we must look to the law of the State of Hawaii in order to determine the res judicata effect of the foreclosure judgment. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Sunkist Growers*, 104 F.3d at 283; *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir.1990). Under the law of Hawaii:

> The doctrine of *res judicata* basically provides that "[t]he judgment of a court of competent

> jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation not only of issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided."

Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (1969) (citations omitted). In Hawaii the doctrine is applied in a robust way. That is based upon the Hawaii Supreme Court's insistence that parties should be spared unnecessary vexation, expense, and inconsistent results; that judicial resources shall not be wasted; and that the "legal efficacy" of final judgments shall not be undermined, but rather that final determinations "by competent tribunals shall be accepted as undeniable legal truth." *Id.* at 57, 451 P.2d at 822. Thus, while everyone is given the opportunity to present a case, that is "limited to one such opportunity." *Id.*

To serve those ends, the courts of Hawaii ask three questions when they seek to determine whether res judicata should apply to a case. Two of those questions are: "Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Morneau v. Stark Enters., Ltd.*, 56 Haw. 420, 424, 539 P.2d 472, 475 (1975). Those two elements are met in this case. Clearly there was a final judgment by the state circuit court, which was not appealed. *See Kauhane v. Acutron Co., Inc.*, 71 Haw. 458, 464-65, 795 P.2d 276, 279 (1990); *see also Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir.1992). It

is equally pellucid that the Albanos and Norwest were parties to the state court foreclosure proceeding.

The other question asked by the courts in Hawaii requires a bit more analysis and discussion. It is: "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" Actually, when applied in the context of claim preclusion in Hawaii, this means that when a claim concerns the same subject matter, the doctrine applies if the issues "could have been raised in the earlier state court actions." *Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir.1996); *see also Santos v. Hawaii, Dep't of Transp.*, 64 Haw. 648, 652-53, 646 P.2d 962, 965-66 (1982) (per curiam); *Aloha Unlimited, Inc. v. Coughlin*, 79 Hawaii 527, 537, 904 P.2d 541, 551 (Ct.App.1995); *Fuller v. Pac. Med. Collections, Inc.*, 78 Hawaii 213, 218-19, 891 P.2d 300, 305-06 (Ct.App.1995). We recognize that the Albanos defaulted in state court, but that does not matter. "[A] default judgment is a final judgment to which" res judicata principles apply. *Fuller*, 78 Hawaii at 219, 891 P.2d at 306. The only exception is for void judgments, and that does not apply here. *Id.*

There can be no doubt whatsoever that the Albanos TILA claim could have been litigated in the foreclosure action. It was a defense that would have ineluctably precluded foreclosure if the Albanos' claims are meritorious. The Albanos' complaint asserts as much. Were there the slightest doubt about the Albanos ability to raise a TILA counterclaim in the state court proceedings, the Supreme Court of Hawaii has dispelled that doubt. It has held that when a party sought to assert a TILA counterclaim,

> [h]is allegations of TILA violations centered around appellee's failure to disclose fully certain aspects of the loan. These loans were the very ones that were the subject of appellee's claims. . . . [I]t seems "inescapable that credit terms are an integral part of a loan transaction." We find that appellant's claims arose out of the same loan transaction as appellee's suit and as such was a recoupment defense to diminish plaintiff's recovery.

Pac. Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 341, 614 P.2d 936, 940 (1980) (citations omitted). The Albanos, rather weakly, assert that in *Pac. Concrete* the provenance of the court's holding was a desire to help the debtor. Perhaps so, but legal principles often cut in two directions; if TILA claims arise out of the same transaction they do so for good or ill. The Albanos could have raised their defense in the state court action. They did not and it is now too late.[2] We do not, of course, decide what the result would be in a state where res judicata principles are enunciated or applied in a different manner. *See, e.g., Smith v. Wells Fargo Credit Corp.*, 713 F.Supp. 354, 357-59 (D.Ariz.1989). We deal here with the preclusive effect of judgments entered in the courts of the State of Hawaii.

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[2] In an attempt to save their position, the Albanos point to *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998). However, *Beach* offers them no succor. That case simply held that the TILA recission right has a limited – three year – life. *Id.* at 419, 118 S.Ct. at 1413. That fact merely sets out the right's maximum life span; it does not affect procedural or substantive requirements that might end its existence even earlier.

CONCLUSION

Rights can be both powerful and transitory. If they are not asserted at the proper time, they may vanish forever. What was once puissant may become a mere simulacrum – an unreal shadow of its former self. So it is here. Once the Albanos allowed the state court to proceed to a final judgment of foreclosure against them, any right they had to rescind the underlying mortgage transaction vanished. The district court did not err.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WARREN Y.S.C. ALBANO and CAROLINE C.S. ALBANO, Plaintiffs, vs. NORWEST FINANCIAL HAWAII, INC., Defendant.	)	Civil No. 97-00247 SPK ORDER (Filed Jan. 28, 1999)

ORDER GRANTING DEFENDANT NORWEST FINANCIAL HAWAII, INC.'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Warren and Caroline Albano ("Plaintiffs" or "Albanos") bring this action under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, as amended, *et. seq.*, seeking recission and damages related to a residential mortgage loan transaction. Plaintiffs assert that Norwest Financial Hawaii, Inc., ("Defendant" or "Norwest") violated certain TILA disclosure requirements when Norwest failed to deliver copies of a Regulation Z notice to cancel and failed to make accurate Regulation Z disclosures.

By motion filed November 2, 1998, Norwest seeks summary judgment on all claims brought by the Albanos. The matter was heard on January 25, 1999. Bruce Lamon and Lisa Bail appeared for Defendant; and Gary Victor Dubin appeared for Plaintiffs. For the reasons set forth,

the Court GRANTS Defendant's Motion for Summary Judgment.

I. BACKGROUND

On March 15, 1994, Plaintiffs obtained a mortgage loan in the amount of $97,058.78 from Norwest in connection with their property located at 769 Wailupe Drive, Wailuku, Maui (the "Maui Property"). Norwest obtained a mortgage interest in the Maui Property and the Albanos refinanced the March 15th loan, borrowing $191,450.43; Norwest obtained a new mortgage on the Maui Property and the Albanos signed a new Note and Security Agreement.

TILA requires that all borrowers be given notice of TILA's "buyer's remorse" provision, which allows borrowers three business days to rescind, without penalty, a consumer loan that uses their principal dwelling as security. *See* 15 U.S.C. § 1635(a)[1]; 12 C.F.R.

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[1] 15 U.S.C. § 1635(a) provides:

> Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the

§ 226.23(b)(5).[2] TILA and its regulations, issued by the Federal Reserve System, 12 C.F.R. §§ 226.1-.29, Regulation Z, require the lender to provide notice disclosing the borrower's three-day rescission period. *See* 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(b)(5). If the lending institution fails to provide this disclosure, the borrower may rescind the loan within three years after it was consummated. *See* 15 U.S.C. § 1635(f).[3] The Albanos did not

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creditor, in accordance with regulations of the Board, of his intention to do so.

[2] 12 C.F.R. § 226.23 provides:

(b) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind.

[3] 15 U.S.C. § 1635(f) provides:

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period of judicial review thereof, whichever is later.

receive a "Notice of Right to Cancel" disclosure in connection with the 1994 mortgage loans.[4]

The Albanos defaulted on the July 11, 1994 loan, and on May 27, 1996, Norwest filed a foreclosure suit against the Albanos in state court. Default was entered against them for failure to plead. On January 13, 1997, the Circuit Court of the Second Circuit, State of Hawaii entered an order granting Norwest's motion for summary judgment, which foreclosed the mortgage.

In March of 1997, Warren and Caroline Albano separately sent Norwest written cancellation notices seeking rescission of the 1994 loan agreements. Norwest denied Plaintiffs' request, stating that under 15 U.S.C. § 1635(a), TILA does not provide the Albanos with a right of rescission because the Maui Property which secures their mortgage is not their principal dwelling.

On August 19, 1997, the Maui Property was sold at a foreclosure sale to Norwest; the sale was confirmed by court order. On the same date, the state court entered a Judgment for Possession and a Writ of Possession. Norwest took possession of the property and sold it to third parties.

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[4] A borrower is entitled to rescind a loan and is entitled to notice of that right only when the property securing the loan is used as the borrower's principal residence. *See* TILA, 15 U.S.C. 1635(a); Regulation Z, 12 C.F.R. § 226.15(a), (b). Plaintiffs, in applying for the loan involved here, represented to Norwest that the Maui Property securing the loan was not their residence, but was "rental property" occupied by their children. Conversely, the Albanos deny that such a representation was made to Norwest, and claim that the Maui Property is, and was always, their principal dwelling.

Plaintiff Warren Albano, proceeding at the time *pro se*, instituted this action by filing a Complaint on March 14, 1997, requesting rescission of the 1994 loans and mortgages under TILA and Regulation Z. Plaintiff subsequently retained the services of Gary Victor Dubin, who made appearances in this matter on June 16, 1998. An Amended Complaint, filed October 27, 1998, added Caroline Albano as a plaintiff, and was made pursuant not only to TILA and Regulation Z, but also the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) and Hawaii Revised Statutes ("HRS") Chapter 480.

Plaintiffs' opposition to Norwest's summary judgment motion was untimely filed on January 14, 1999.[5] Norwest's reply was timely filed on January 20, 1999. On January 25, 1999, Plaintiffs filed a Supplemental Memorandum in Opposition to Defendant's Summary Judgment Motion.

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc.*

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[5] Plaintiffs' Opposition was originally due on January 7, 1999. Plaintiffs were granted leave to file an Opposition to Defendant's Motion for Summary Judgment by January 13, 1999. Plaintiffs' Opposition was filed one day late on January 14, 1999.

v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue of trial" in order to defeat the motion. Fed. R. Civ. P. 56(e); *T.W. Elec.*, 809 F.2d at 630. The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. *See* Fed. R. Civ. P. 56(e); *T.W. Elec. Serv.*, 809 F.2d at 630. In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. *See State Farm Fire & Cas. Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989).

III. DISCUSSION

Norwest moves for summary judgment on the following bases: 1) the Albanos have no right of rescission under TILA because the Maui Property was not their principal dwelling; 2) the Albanos' claims are barred by TILA's one year statute of limitations; 3) the Albano's claims are barred by the Rooker-Feldman abstention doctrine; 4) the Albanos' claims are barred by the doctrine of res judicata; 5) the Federal Trade Commission does not allow a private right of action; and 6) HRS chapter 480 does not provide a *per se* state law rescission remedy for TILA violations.

A. Res Judicata

Norwest argues that Plaintiffs' TILA claims are barred by the doctrine of res judicata. Specifically, Norwest states that the Albanos are barred from raising their

TILA claims because the issues relating to the loan and mortgage, which are the subject of the instant federal action, have been adjudicated in state court.

Res judicata prevents parties from relitigating claims or issues that have already been decided or could have been decided by a competent tribunal. *See Santos v. State of Hawaii*, 64 Haw. 648, 651-52, 646 P.2d 962, 965 (1982). It protects the integrity of the courts, promotes reliance upon judicial pronouncements, furthers the finality of legal disputes and eliminates the time and expense of relitigation by requiring that parties bring all claims arising out of a transaction in one action. *See id.* at 653, 646 P.2d at 966.

In the federal courts, res judicata arises from the Full Faith and Credit Clause of the United States Constitution, 28 U.S.C. § 1738.[6] As a result, federal courts must give state court judgments the same preclusive effect that the judgment would be given in state court. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 80-81 (1984). Accordingly, "[i]n determining whether a prior state court action bars a subsequent federal action, the federal court must look to the res judicata principles of the state court in which the judgment was rendered."

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[6] 28 U.S.C. § 1738 states in relevant part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Pedrina v. Chun, 97 F.3d 1296, 1301 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2441 (1997).

Under the doctrine of res judicata, Hawaii courts recognize that " '[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the claims that were actually litigated in the first action, but also of all grounds of claim [and defense] which might have been properly litigated in the first action but were not litigated or decided.' " *Kauhane v. Acutron Co., Inc.*, 71 Haw. 458, 463, 795 P.3d 276, 278 (1990) (citation omitted).

In sum, the res judicata doctrine in Hawaii applies when three conditions are present: 1) the claim asserted in the action in question was or could have been asserted in the prior action, 2) the parties in the present action are identical to, or in privity with, the parties in the prior action, and 3) a final judgment on the merits was rendered in the prior action. *See Pedrina*, 97 F.3d at 1301.

1. Claim Could Have Been Asserted

To determine whether a plaintiff is bringing the same claim as that asserted in the state foreclosure action, Hawaii law requires that the court look to whether the claim springs from the same transaction or series of transactions, or series of connected transactions that were at

issue in the prior action.[7] *See Kauhane*, 71 Haw. at 464, 795 P.2d at 279. Thus, to determine whether the Plaintiffs are bringing the same claim, the Court must determine whether Plaintiffs' TILA action should be deemed to arise out of the same transaction upon which the state foreclosure action was based.

The Hawaii Supreme Court's decision in *Pacific Concrete Federal Credit Union v. Kauanoe*, 62 Haw. 334, 614 P.2d 936 (1980), offers guidance in resolving this issue. In *Kauanoe*, a creditor brought an action against a debtor to collect the outstanding balance owed on two loans. *See id.* at 335, 614 P.2d at 937. The debtor counterclaimed, asserting that the creditor was liable to the debtor for not meeting the disclosure requirements set forth in TILA. *See id.* At issue in the case was whether the TILA claim was barred by the statute of limitations. To resolve that issue, the court had to determine whether the debtor's TILA claim arose out of the same transaction as the creditor's collection claim. *See id.* at 337-39, 614 P.2d at 938-39. The creditor argued that debtor's TILA claim did not arise out of the same transaction or involve breach of the same contract, contending that the TILA violations were separate and apart from the loan obligations and that the claims involved different statutes. *See id.* at 340, 614 P.2d

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[7] The Hawaii Supreme Court cites the Restatement (Second) of Judgments in explaining the rationale behind this transactional definition of "claim," which states:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories[.]

Kauhane, 71 Haw. at 464, 795 P.2d at 279 n.6.

at 940. The court rejected the creditor's argument and found that the debtor's TILA action arose out of the same transaction as the creditor's collection suit. *See id.* at 341, 614 P.2d at 940. The court stated, "it seems 'inescapable that credit terms are an integral part of a loan transaction.' " *Id.* (citation omitted). Under *Kauanoe*, Plaintiffs' TILA action arises out of the same transaction that was at issue in the state foreclosure action.

The fact that the Albanos raise claims in this action that were not alleged in the prior action does not negate the preclusive effect of the state court action. The doctrine of res judicata precludes not only the relitigation of issues which were actually litigated in the first action, but also all defenses which might have been properly litigated but were not. *See Silver v. Queen's Hosp.*, 63 Haw. 430, 435-36, 629 P.2d 1116, 1121 (1981). Plaintiffs could have presented their TILA claim in state court as an affirmative defense or counterclaim to Defendant's foreclosure action. *See Kauanoe*, 62 Haw. at 341, 614 P.2d at 940. Accordingly, the Court finds that Plaintiffs' TILA claim concerned the same subject matter as the state foreclosure action and that Plaintiffs' TILA claims could have been asserted in the prior action.

2. Identical Parties

The res judicata doctrine also requires that the parties in the present action are identical to, or in privity with, the parties in the prior action. *See Kauhane*, 71 Haw. at 464, 795 P.2d at 279. There is an identity of parties here in that the same exact Plaintiffs and Defendant were named in both this federal action and in the state action.

3. Final Judgment on the Merits

The third res judicata requirement is that there be a final judgment in the prior case. *See Pedrina*, 97 F.3d at 1301. Judgment in the state action entering summary judgment and foreclosing the mortgage was issued on January 12, 1997. "[I]n cases involving mortgage foreclosures, a judgment of foreclosure and order of sale is final and appealable although it contains provisions for the determination of matters incident to its administration and for disposition of the proceeds of the sale." *Security Pac. Mortgage Corp. v. Miller*, 71 Haw. 65, 69, 783 P.2d 855, 857 (1989). Plaintiffs did not file an appeal of the judgment.[8] Accordingly, the Court finds that final judgment on the merits was rendered in the prior action. Based on the foregoing, the Court finds that the three prongs of res judicata analysis have been met, and Plaintiffs are clearly subject to res judicata based on the state court action.

During oral argument, however, Plaintiffs argued that res judicata was not applicable to TILA rescission claims based on the Circuit Court of the First Circuit's holding in *Tokyo Investment Services (International) Inc. v. Gilman*, No. 92-1459-04, (Haw. 1st Cir. Nov. 24, 1998). In *Gilman*, Judge Virginia L. Crandall allowed a borrower's TILA rescission claim to proceed on the basis that such claims are permissive counterclaims. *See id.* at 5. Plaintiffs claim that *Gilman* renders the doctrine of res judicata inapplicable to the instant action because their TILA

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[8] Perhaps Plaintiffs realized, having represented to Norwest that the Maui Property was not their principal dwelling, that they would not succeed.

rescission claim is a permissive counterclaim, which can effectively be brought as a separate suit.

The *Gilman* decision is irrelevant to this action. First, the facts surrounding the decision are unclear. More importantly, however, *Gilman* is inconsistent with the Hawaii Supreme Court's decision in *Ellis v. Crockett*, 51 Haw. 45, 57, 451 P.2d 814, 822 (1969). In *Ellis*, a plaintiff's action to rescind a note and mortgage was barred by a prior court order granting foreclosure of the note and mortgage. *See id.* The court found "[t]he rescission action . . . barred because the [lower] court granted the foreclosure in the prior suit, thereby deciding all issues relating to the validity of the mortgage instrument[.]" *Id.*

Accordingly, the Court finds Norwest's Motion for Summary Judgment based on the res judicata effect of the foreclosure action to have merit and GRANTS the motion on that basis.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Norwest's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 28, 1999.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge

APPENDIX C

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

NORWEST FINANCIAL HAWAII, INC., Plaintiff, vs. CAROLINE C.S. ALBANO, a.k.a. CAROLINE C. ALBANO, a.k.a. CAROLINE ALBANO; WARREN Y.S.C. ALBANO, a.k.a. WARREN ALBANO; COUNTY OF MAUI; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50; Defendants.	CIVIL NO. 96-0412(2) (Foreclosure) FINDINGS OF FACT; CONCLUSIONS OF LAW; ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS AGAINST ALL DEFENDANTS AND FOR INTERLOCUTORY DECREE OF FORECLOSURE; EXHIBIT "A" DATE: Wednesday, July 17, 1996 TIME: 8:30 A.M. JUDGE: Shackley F. Raffetto (Filed Jan. 13, 1997)

FINDINGS OF FACT; CONCLUSIONS OF LAW; ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS AGAINST ALL DEFENDANTS AND FOR INTERLOCUTORY DECREE OF FORECLOSURE

Plaintiff NORWEST FINANCIAL HAWAII, INC. ("Nortwest Financial") filed a "Motion For Summary Judgment As Against All Defendants And For Interlocutory Decree Of Foreclosure" on June 26, 1996 in this action. The Motion came on for hearing before the Honorable Shackley F. Raffetto, Judge of the above-entitled court, in his courtroom on July 17, 1996 at 8:30 A.M.

Norwest Financial was represented by Marvin S.C. Dang, Esq. No one else appeared.

FINDINGS OF FACT

This Court heard and considered the evidence presented, and being fully advised, finds as follows:

1. Norwest Financial is a Hawaii corporation doing business in the City and County of Honolulu, State of Hawaii.

2. Defendants CAROLINE C.S. ALBANO, a.k.a. CAROLINE C. ALBANO, a.k.a. CAROLINE ALBANO, and WARREN Y.S.C. ALBANO, a.k.a. WARREN ALBANO (collectively called "Defendant Borrower") are residents of the City and County of Honolulu, State of Hawaii.

3. On or about July 11, 1994, Defendant Borrower, as Borrower, made, signed, and delivered to Norwest Financial a "Note and Security Agreement (including

Loan Statement)" for the amount financed of One Hundred Ninety-One Thousand Four Hundred Fifty and 43/100 Dollars ($191,450.43), plus interest and points (the "Note").

4. For the purpose of securing the Note, Defendant Borrower signed in favor of and delivered to Norwest Financial, as Mortgagee, a Real Estate Mortgage dated July 11, 1994 ("Mortgage"), and which was recorded as Document No. 94-116814 in the Bureau of Conveyances of the State of Hawaii.

5. The legal description of the mortgaged property secured by the Mortgage is attached as Exhibit "A" and is made a part of these Findings. The mortgaged property is located at 769 Wailupe Drive, Wailuku, Hawaii 96793, Tax Map Key No.: (2) 3-3-7:51.

6. Norwest Financial is now and has at all times been the owner and holder of the Note and the Mortgage since the making, signing and delivery of each document.

7. Defendant Borrower is in default under the terms of the Note and the Mortgage because Defendant Borrower has breached the promise to pay the amounts due at the times the amounts became due and payable and/or Defendant Borrower has breached other promises. Because of the breaches, Norwest Financial has exercised Norwest Financial's option under the terms and conditions of the Note and the Mortgage to declare the entire principal balance due under the Note and the Mortgage, immediately due and payable, together with interest, points, late charges, costs, expenses, advances, and attorney's fees. Defendant Borrower has failed, neglected, and refused, and still fails, neglects, and refuses to pay the

amounts owed and/or to comply with the terms of the Note and the Mortgage.

8. As of April 23, 1996, the amounts due and owing under the Note and the Mortgage are as follows:

Principal Balance		$206,793.26
Interest to and including April 23, 1996		4,794.82
Advances:		
Circuit Court filing fee	$100.00	
Sheriff's fees	55.25	
Bureau of Conveyances fees	20.00	
Messenger fees	5.20	
Subtotal for Advances		180.45
Less: Refund of Life Insurance		(1,756.49)
TOTAL DUE AND OWING		$210,012.04

The above amounts, together with interests, points, attorney's fees, and such other amounts as may be properly chargeable until the closing of the foreclosure sale, are a valid lien on the mortgaged property.

The interest on the Note is at the rate of $61.47 per day for each day after April 23, 1996, plus points, late charges, costs, expenses, advances, and attorney's fees.

9. The Mortgage lien is a valid first lien on the mortgaged property prior and senior to the interests of all Defendants in the mortgaged property.

10. The Mortgage provides that Norwest Financial may be the purchaser at any foreclosure sale. Norwest Financial may be awarded all amounts secured by the Mortgage, including reasonable attorney's fees and all

costs, expenses, and advances made by Norwest Financial for the benefit and protection of the Mortgage and/or in connection with the Mortgage.

11. Under Section 501-151 and/or Section 634-51, Hawaii Revised Statutes, a Notice of Pendency of Action of the subject foreclosure action was recorded on May 24, 1996 as Document No. 96-073210 in the Bureau of conveyances of the State of Hawaii.

12. There is no just reason for delay in entering a final judgment as to Norwest Financial's Complaint.

CONCLUSIONS OF LAW

Pursuant to the above Findings of Fact, this Court concludes as a matter of law that:

1. This Court has jurisdiction over the parties to this action based on their residence, their transaction of business in this State, their interest, ownership, use, or possession of real estate in this State, and/or their voluntary submission to this Court's jurisdiction. This Court also has jurisdiction because the mortgaged property is located in the State of Hawaii. the venue of this action is proper.

2. Norwest Financial is entitled to accelerate the indebtedness under the Note and the Mortgage. Accordingly, the entire unpaid amounts under the Note and the Mortgage are due and owing.

3. There is due, owing, and unpaid to Norwest Financial from Defendant Borrower under the Note, the sum of $210,012.04, being principal, interest, points, late charges, costs, expenses, and advances incurred up to

and including April 23, 1996, together with interest accruing at the rate of $61.47 per day for each day after April 23, 1996 and such other sums as the Court may determine to be properly chargeable under the terms of the Note and the Mortgage, including, but not limited to, interest, points, late charges, costs, expenses, advances, and attorney's fees.

4. Norwest Financial is entitled to have a foreclosure of the Mortgage on the mortgaged property and to have the mortgaged property sold in a manner authorized by law.

5. The Mortgage is a valid first lien on the mortgaged property prior and senior to the interests of all Defendants in the mortgaged property.

6. Norwest Financial is entitled to a judgment as a matter of law on Norwest Financial's Complaint.

7. This Court expressly directs that final judgment shall be entered as to Norwest Financial's Complaint under Rule 54(b), Hawaii Rules of Civil Procedure, because there is no just reason for delay.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS AGAINST ALL DEFENDANTS AND FOR INTERLOCUTORY DECREE OF FORECLOSURE

IT IS ORDERED, ADJUDGED, AND DECREED:

1. Norwest Financial's Motion is granted. A Summary Judgment and Interlocutory Decree of Foreclosure is entered in favor of Norwest Financial and against all Defendants.

2. Defendant Borrower is in default under the Note and the Mortgage, all of which are currently held by Norwest Financial. Judgment is granted in favor of Norwest Financial and against Defendant Borrower for the amounts due under the Note and the Mortgage. There is due, owing and unpaid to Norwest Financial from Defendant Borrower under the Note, the sum of $210,012.04, being principal, interest, points, late charges, costs, expenses, and advances incurred up to and including April 23, 1996, together with interest accruing at the rate of $61.47 per day for each day after April 23, 1996, and such other sums as the Court may determine to be properly chargeable under the terms of the Note and the Mortgage, including, but not limited to, interest, points, late charges, costs, expenses, advances, and attorney's fees.

3. The Mortgage is a valid first lien on the mortgaged property prior and senior to the interests of all Defendants in the mortgaged property.

4. The Mortgage is foreclosed as requested. The mortgaged property shall be sold at public auction or by private sale, "AS IS", without any upset price, as authorized by law and under the terms of the Mortgage. The sale shall not be final until approved and confirmed by this Court.

5. Renee Ishikawa, Esq., whose address is 1931 Vineyard Street, #201, Wailuku, HI 96793, and whose telephone number is 243-8032, is appointed as Commissioner by this Court.

No bond shall be required of the Commissioner.

If the Commissioner refuses, or becomes unable to act as Commissioner, this Court shall appoint another Commissioner without further notice of hearing.

The Commissioner shall be awarded a reasonable fee and costs as to be subsequently determined by this Court. The Commissioner's fees and costs shall be deemed to be secured by Norwest Financial's lien on the mortgaged property.

6. The Commissioner shall hold all equitable and legal title to the mortgaged property. The Commissioner is authorized and directed to take possession of the mortgaged property, to rent the mortgaged property pending foreclosure, if appropriate, and to sell the mortgaged property in its "AS IS" condition, without any representations or warranties whatsoever as to title or possession, and with a quitclaim conveyance, either by private sale or at a public foreclosure sale by auction to the highest bidder. The mortgaged property shall be sold without any upset price and in accordance with this Order.

No public Commissioner's sale shall occur until after notice of the foreclosure sale is first given by the Commissioner by publication in the classified section of a daily newspaper of general circulation in the County in which the mortgaged property is located, as may be directed by this Court from time to time. The notice shall be published once each week for three (3) consecutive weeks with the auction to take place no sooner than fourteen (14) days after the date of the publication of the third advertisement, and as may be further directed by this Court from time to time. The notice shall give the

date, time, and place of sale and an intelligible description of the mortgaged property, and shall disclose all of the terms of sale.

The Commissioner may continue any foreclosure sale from time to time in the Commissioner's discretion.

The Commissioner may accept a private offer in lieu of a public auction to purchase the mortgaged property, subject to confirmation by this Court. Any party to this action, including the Commissioner, may file a motion to confirm the private sale.

7. Norwest Financial and all other parties are authorized to purchase at the foreclosure sale. The successful bidder at the foreclosure sale is to make a down payment to the Commissioner in an amount not less than ten percent (10%) of the highest successful bid price. The payment is to be in cash, money order, or by certified or cashier's check. However, Norwest Financial and other secured lienholders may satisfy the down payment by offset and credit bid up to the amount of their secured debt.

Prior to bidding, any person not authorized by this Order to credit bid must show proof to the Commissioner of that person's capability to pay the required down payment in such form prior to bidding.

At this Court's discretion, the down payment may be forfeited in full or in part if the successful bidder fails to pay the balance of the purchase price as ordered by this Court. However, that bidder shall not be liable for damages greater than the forfeiture of the down payment.

8. A hearing shall be held to consider the confirmation of the foreclosure sale. At the hearing, this Court shall hear proof of claim of any other party, and shall determine the priority among the claims of the other parties besides Norwest Financial, as appropriate.

At the hearing, this Court will also allow reopening of the auction by accepting higher bids, the first of which must be at least one hundred five percent (105%) of the highest bid at the Commissioner's sale. Anyone may reopen the auction by bidding, including all parties to this action and any other interested person, whether or not the party or interested person had bid, or could have bid, at the Commissioner's sale.

This Court shall determine the amount of the fee and costs of the Commissioner, and the amount of the attorney's fees and costs of Norwest Financial and the other parties. The final payment of the proceeds of the foreclosure sale shall be directed by this Court.

9. At the hearing, if it appears that the proceeds of the foreclosure sale shall be insufficient to pay all the sums owed to Norwest Financial, and if it appears that any deficiency exists, this Court shall direct, as appropriate, that a judgment for the deficiency shall be entered against Defendants CAROLINE C.S. ALBANO, a.k.a. CAROLINE C. ALBANO, a.k.a. CAROLINE ALBANO, and WARREN Y.S.C. ALBANO, a.k.a. WARREN ALBANO, jointly and severally, in favor of Norwest Financial. Norwest Financial shall have execution on that judgment.

10. The balance of the purchase price shall be paid to the Commissioner upon approval and confirmation of

the foreclosure sale by this Court and the tender of the document transferring title to the mortgaged property. The payment shall be in cash, money order, or by certified or cashier's check. However, if Norwest Financial or any other secured lienholder is the successful purchaser, then that successful purchaser may satisfy the balance of the purchase price by offset up to the amount of their secured debt as determined by this Court.

The Commissioner will close the sale through a licensed Hawaii escrow company if so requested by the purchaser or if so ordered by this Court.

The cost and expenses of closing, including, but not limited to, the costs of conveyance, including preparation of the conveyance document, conveyance tax, escrow fees, recording fees, any proof of title, title insurance, notary fees, and the costs of securing possession of the mortgaged property at recordation shall be the responsibility of and paid by the purchaser. The purchaser is responsible for securing possession of the mortgaged property at closing. Neither the availability of the leased fee interest (as appropriate), nor the availability of title insurance or any other insurance, nor the securing of possession of the mortgaged property shall be a condition of closing.

11. The Commissioner shall hold all proceeds of the foreclosure sale of the mortgaged property, and shall receive, collect, and hold all rents and profits, if any, to the credit of this action, subject to the directions of this Court. Upon distribution of the sales proceeds to the lienors in the order of their priority and according to the directions of this Court, the Commissioner shall file an

accurate accounting of the Commissioner's receipts, expenses, and distributions.

This Court reserves jurisdiction to determine the party or parties to whom any surplus shall be awarded.

12. Defendants CAROLINE C.S. ALBANO, a.k.a. CAROLINE C. ALBANO, a.k.a. CAROLINE ALBANO, and WARREN Y.S.C. ALBANO, a.k.a. WARREN ALBANO, and all persons claiming by, through or under Defendants CAROLINE C.S. ALBANO, a.k.a. CAROLINE C. ALBANO, a.k.a. CAROLINE ALBANO, and WARREN Y.S.C. ALBANO, a.k.a. WARREN ALBANO, except any governmental authority enforcing a lien for unpaid real property taxes as to the mortgaged property, are perpetually barred of and from any and all right, title, and interest in the mortgaged property and any part of the mortgaged property, except as otherwise ordered by this Court.

13. If the Commissioner deems it advisable to remove the occupants and their personal belongings and/or the personal property of the owners of the mortgaged property, the Commissioner may obtain a Writ of Possession and at the Commissioner's sole discretion arrange for the removal of the occupants and their personal belongings/personal property to a suitable storage area for storage. If such personal belongings/personal property are not claimed within a thirty (30) day period following initial storage, the Commissioner may in the Commissioner's sole discretion dispose of such personal belongings/personal property in a commercially reasonable manner, as provided by law, or by further order of

this Court. Any funds generated by the sale shall be distributed according to the further order of this Court.

14. Pursuant to Section 501-151 and/or 634-51, Hawaii Revised Statutes, all other or further encumbrancers or purchasers of the mortgaged property or any part of the mortgaged property whose interest arises from and after May 24, 1996, are forever barred and foreclosed of and from any and all right, title, and interest and in the mortgaged property and any part of the mortgaged property.

15. This Court reserves jurisdiction to determine the party or parties for whom or against whom a deficiency judgment may be awarded or applied, and this Court shall otherwise retain jurisdiction in this action of all matters and claims not yet determined.

16. This Court expressly directs that pursuant to Rule 54(b), Hawaii Rules of Civil Procedure, the Summary Judgment and Decree of Foreclosure is entered as a Final Judgment as to Norwest Financial's Complaint because there is no just reason for delay.

17. Norwest Financial shall have such other and further relief as this Court may deem to be proper and appropriate in the premises.

FAIR DEBT COLLECTION PRACTICES ACT NOTICE: THIS IS AN IN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. THE DEBT MAY HAVE BEEN DISPUTED.

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DATED: Honolulu, Hawaii, JAN 13 1997

/s/ Shackley F. Raffetto (Seal)
JUDGE OF THE
ABOVE-ENTITLED COURT

Norwest Financial Corporation vs. Caroline C.S. Albano, a.k.a. Caroline C. Albano, a.k.a. Caroline Albano, Warren Y.S.C. Albano, a.k.a. Warren Albano, et al.

Civil No. 96-0412(2)

Second Circuit Court

"Findings Of Fact; Conclusions Of Law; Order Granting Plaintiff's Motion For Summary Judgment As Against All Defendants And For Interlocutory Decree Of Foreclosure; Exhibit "A" "

EXHIBIT "A"

That certain parcel of land situate at Paukukalo, Waiehu, Wailuku, Island and County of Maui, State of Hawaii, described as follows:

Lot 124, area 8,174 square feet, more or less, of the "Waiehu Heights Subdivision", as shown on the map filed in the bureau of Conveyances, State of Hawaii as File Plan No. 1482.

Being the land conveyed to Warren Y.S.C. Albano and Caroline C.S. Albano, husband and wife, Tenants by the Entirety, by Deed dated August 28, 1980, recorded October 8, 1980, in the Bureau of Conveyances, State of Hawaii, in Book 15041, Page 444.

SUBJECT, HOWEVER, TO THE FOLLOWING:

1. Title to all minerals and metallic mines reserved to the State of Hawaii.
2. Reservation of all water and water rights within or appurtenant to the said property in favor of Wailuku Sugar Company, a Hawaii corporation, as reserved in that certain Deed dated and recorded April 5, 1973, in the Bureau of Conveyances, State of Hawaii, in Book 9054, Page 67.

END OF EXHIBIT "A"

769 Wailupe Drive
Wailuku, Hawaii 96793
Tax Map Key No.: (2) 3-3-7:51